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S. Hrg. 101-355

HEARINGS ON MEASURES TO PROTECT THE PHYSICAL INTEGRITY OF THE AMERICAN FLAG

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 1338, H.R. 2978, and S.J. Res. 180

AUGUST 1, 14, SEPTEMBER 13, AND 14, 1989

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MEASURES TO PROTECT THE PHYSICAL INTEGRITY OF THE AMERICAN FLAG

TUESDAY, AUGUST 1, 1989

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 10:45 a.m., in room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Kohl, Thurmond, Hatch, Simpson, Grassley, Specter, and Humphrey.

The Chairman. The hearing will come to order.

Let me begin by making our collective apologies to the witnesses, first of all, as well as to others who came to cover and/or observe this important hearing. We had a Judiciary Committee hearing earlier today beginning at 9 o'clock on two important nominations, one very controversial nomination, that, in fact, took us all this time. So, again, I apologize to the witnesses, and I thank them for their courtesy and the generosity that they have demonstrated by being willing to be here and give us their time.

Let me also state at the outset, not as an absolute rule, but as a suggestion, I assume my colleagues will support us moving in the following direction. That is, we ordinarily would have opening statements by Senators who wish to make statements and comments. But our single most distinguished witness of the day, in the entire hearing process, is sitting before us, and he happens to be the ranking member of the committee, Senator Thurmond, and the sponsor of a constitutional amendment. I would propose that we begin with Senator Thurmond. Those of us who have questions for him, ask the questions. And then between the time it takes for Senator Thurmond to resume his place as the ranking member of this committee and the next witness being called forward, Senators who have opening statements would make them at that time.

I would further suggest that we limit our questions in the first round to 15 minutes, less if possible, and that we had planned—and I would continue to attempt to hold to the plan—to break at 12:30 because of the caucus of our colleagues in the full Senate, break from 12:30 until 2.

And one last request I would make of my colleagues. Two of our colleagues on this committee have been taking on a great responsibility in the impeachment trial of Judge Hastings. Because they are so deeply involved, it is difficult for them to be able to get here.

I would ask unanimous consent that at 12 o'clock, or as close to that hour as possible, when both Senators Leahy and Specter are able to leave the impeachment proceeding, notwithstanding the general order of the questioning, that they be given the opportunity at that time when they arrive at the conclusion of the questioning of the Senator who is in progress, that they be next in order. Is there any objection to that unusual proceeding? It is an unusual circumstance.

[No response.]

The CHAIRMAN. Without objection, that is how we will proceed.

Now, as I said, we will forego at this moment our opening statements and hear from the primary sponsor of a constitutional amendment before this committee, Senator Thurmond of South Carolina. Welcome to that side of the table, Mr. Chairman, and we are anxious to hear what you have to say. Would you please proceed?

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Thank you very much, Mr. Chairman and members of the committee. I will make my statement and then resume my seat, as you stated, over on the committee.

I am pleased to have the opportunity to testify as we begin the first of four hearings to receive testimony on proposed legislation to overturn the Supreme Court's decision in *Texas* v. *Johnson* 57 U.S.L.W. 4770 (June 21, 1989).

This should not be a partisan issue. An earlier resolution expressing disapproval with the Supreme Court's ruling which allows for the burning of the American flag passed the Senate with strong bipartisan support by a 97–3 vote.

The fact is, as a body, the U.S. Senate wants to see this opinion overturned. The American people overwhelmingly want this decision overturned. The question remaining is to determine the most desirable and effective approach to achieve our objective. Some members have suggested a statutory approach while many others advocate a constitutional amendment. It is my firm belief that a constitutional amendment is the most sound and safe course to ensure the integrity of the American flag.

Let us assume for the sake of discussion that the distinguished chairman's bill is passed, signed by the President, and subsequently challenged as unconstitutional. It could be a long time before we get a definitive ruling from the Supreme Court on this bill.

The House bill reported by Chairman Brooks from the Judiciary Committee last week provides for expedited review by the Supreme Court. This may be needed if the Congress passes statutory language to protect the flag.

However, even if the Supreme Court under expedited review procedures were to uphold this bill as constitutional, there are still concerns which must be resolved. The *Johnson* decision was close—5–4. While this bill might change the mind of one Justice and survive a constitutional challenge, there is no assurance that future decisions or a different Supreme Court would rule favorably on this issue. A constitutional amendment would firmly establish that the

Congress and the States can prohibit the physical desecration of the American flag.

Immediately after the *Johnson* decision, I introduced a proposed constitutional amendment to overturn that decision, and we now have 45 cosponsors. Also, along with Senators Dole, Dixon, Heflin, and others, we recently introduced another proposed constitutional amendment on behalf of President Bush. I believe both proposals to be acceptable, simple, and a straightforward approach to protect the American flag.

Those who recommend addressing this decision by statutory language surely understand that there is no guarantee a statute would be upheld as constitutional under the *Johnson* decision. Clearly, the Supreme Court ruled in this case that the burning of the American flag is an expressive act and protected under the first amendment.

In this decision, the Court stated, as it did in *U.S.* v. *O'Brien* and *Spence* v. *Washington*, that the Government must have an important reason in order to restrain expressive conduct and the reason is to be unrelated to the expression.

It is no secret that our objective is to protect the American flag from expressive acts of physical desecration. Unless we are confident that the Supreme Court will decide the Government has a compelling reason to protect the flag, then there is little certainty the statutory approach will get the job done. Of course, if the Court determines that the *O'Brien* decision is inapplicable, then it is unlikely the statute will be upheld under a more exacting scrutiny.

Further, in the *Johnson* case, a majority of the Court had an opportunity, through its earlier decisions, to find the Texas statute constitutional. Under the "fighting words" test, or the "important governmental interest" standard set forth in the *O'Brien* decision, the Supreme Court could have upheld the Texas statute and protected the symbol of our democratic values. Yet a majority of the Court reasoned that the interest of the Texas Legislature in protecting our flag as a symbol of our Nation was related to the suppression of expression and could not justify a prohibition on flag burning. I believe this to be an overly broad interpretation of the first amendment.

I would be remiss if I did not say that I agree with Chief Justice Rehnquist in his dissenting opinion of the *Johnson* decision. Also, he so ably articulated the passions of most Americans when he stated, and I quote:

> The American flag * * * throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the first amendment invalidates the Act of Congress, and the law of 48 of the 50 States, which make criminal the public burning of the flag.

Mr. Chairman, I believe the statement by the distinguished Chief Justice should have been the essence of the majority opinion in the *Johnson* case.

I will support the distinguished chairman's statutory approach to overturn this decision. However, there is much disagreement among our Nation's top constitutional scholars as to the effectiveness of a statute in achieving our objective. Therefore, I believe a constitutional amendment is the safe and prudent course for effectively protecting the flag of the United States of America.

An overwhelming majority of Americans are looking to the Congress, as their elected officials, to reverse this decision and restore the proper civil respect for our American flag.

Mr. Chairman and members of the committee, thank you very much, and I will now resume my position on the committee.

[The prepared statement of Senator Thurmond follows:]

STATEMENT BY SENATOR STROM THURMOND (R-S.C.) BEFORE THE SENATE JUDICIARY COMMITTEE - REFERENCE PROPOSED LEGISLATION TO OVERTURN SUPREME COURT'S DECISION ON FLAG BURNING. TUESDAY, AUGUST 1, 1989, ROOM SR-325, 10:00 A.M.

MR. CHAIRMAN:

I am pleased to have the opportunity to testify as we begin the first of four hearings to receive testimony on proposed legislation to overturn the Supreme Court's decision in Texas v. Johnson 57 U.S.L.W. 4770 (June 21, 1989).

This should not be not a partisan issue. An earlier resolution expressing disapproval with the Supreme Court's ruling which allows for the burning of the American flag passed the Senate with strong bi-partisan support by a 97-3 vote.

The fact is, as a body, the United States Senate wants to see this opinion overturned. The American people overwhelmingly want this decision overturned. The question remaining is to determine the most desirable and effective approach to achieve our objective. Some members have suggested a statutory approach while many others advocate a Constitutional amendment. It is my firm belief that a Constitutional amendment is the most sound and safe course to ensure the integrity of the American flag.

Let us assume for the sake of discussion that the distinguished Chairman's bill is passed, signed by the President and subsequently challenged as unconstitutional. It could be a long time before we get a definitive ruling from the Supreme Court on this bill.

The House bill reported by Chairman Brooks from the Judiciary Committee last week provides for expedited review by the Supreme Court. This may be needed if the Congress passes statutory language to protect the flag.

However, even if the Supreme Court under expedited review procedures were to uphold this bill as constitutional, there are still concerns which must be resolved. The Johnson decision was close -- 5-4. While this bill might change the mind of one justice and survive a constitutional challenge, there is no assurance that future decisions or a different Supreme Court would rule favorably on this issue. A constitutional amendment would firmly establish that the Congress and the States can prohibit the physical desecration of the American flag.

Immediately after the Johnson decision, I introduced a proposed Constitutional amendment to overturn that decision and we now have 45 cosponsors. Also, along with Senators Dole, Dixon, Heflin, and others, we recently introduced another proposed Constitutional amendment on behalf of President Bush. I believe both proposals to be acceptable, simple, and a straightforward approach to protect the American flag.

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In this decision, the Court stated, as did in U.S. v. O'brien and Spence v. Washington, that the government must have a compelling reason in order to restrain expressive conduct and the reason is to be unrelated to the expression.

It is no secret that our objective is to protect the American flag from expressive acts of physical desecration. Unless we are confident that the Supreme Court will decide the Government has a compelling reason to protect the flag -- one that is unrelated to the actual desecration of the flag -- then there is little certainty the statutory approach will get the job done. Of course if the Court determines that the O'brien decision is inapplicable, then it is unlikely the statute will be upheld under a more exacting scrutiny.

Further, in the Johnson case, a majority of the Court had an opportunity, through its earlier decisions, to find the Texas statute constitutional. Under the "fighting words" test, or the "important governmental interest" standard set forth in the O'brien decision, the Supreme Court could have upheld the Texas statute and protected the symbol of our democratic values. Yet, a majority of the Court reasoned that the interest of the Texas legislature, in protecting our flag as a symbol of our Nation, was related to the suppression of expression and could not justify a prohibition on flag burning. I believe this to be an overly broad interpretation of the First Amendment.

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> "The American flag. . .throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag."

Mr. Chairman, I believe the statement by the distinguished Chief Justice should have been the essence of the majority opinion in the Johnson case.

I will support the distinguished Chairman's statutory approach to overturn this decision. However, there is much disagreement among our Nation's top Constitutional scholars as to the effectiveness of a statute in achieving our objective. Therefore, I believe a Constitutional amendment is the safe and prudent course for effectively protecting the flag of the United States of America.

An overwhelming majority of Americans are looking to the Congress, as their elected officials, to reverse this decision and restore the proper civil respect for our American flag.

-END-

The **Chairman**. Thank you, Senator.

Now we will take time for opening statements. I hope we, including me, can make them brief because we have heard one another's views, but I think it is important that they be placed in the record.

OPENING STATEMENT OF SENATOR BIDEN

The **Chairman**. As Senator Thurmond indicated, we are convening the first of what will ultimately be four hearings, possibly less but four hearings likely, on how to deal, if to deal at all, with the *Texas* v. *Johnson* decision. The vast majority of us, with notable exceptions, believe that there should be and must be a way to protect the integrity of what most of us believe to be the significant, unique national symbol—the American flag. A logical question for anyone to ask is: Notwithstanding the fact that it is unique, why is it so important that it be protected?

Now, I realize I may have somewhat of a unique view on this, but the reason I, within 48 hours, I think it was, introduced a statute to make unlawful the burning of the flag, is that I believe it has a status and a function in this country that it does not have in other countries. It serves a unique purpose, and it is a unique symbol. Because I believe that we are the most heterogeneous, the most diverse Nation, the most diverse democracy on earth, and although we are taught as children in school and by our parents that that very diversity is the reason for our strength, that strength flows from diversity. Although ultimately that is true and our Nation is all the better because of the diversity, initially our diversity pushes us apart. It does not bring us together.

The fact that we are black and white does not generate initially a sense of warmth and confidence. People fear that which is different. The fact that we are Christian and Jew does not send us running into one another's embrace to herald our differences. People are leery of that which is different, whether those differences are steeped in culture, religion, or race. And it is not unique to this country, that fear.

When you stop and think, at least when I stop and think and try to answer the question, what constitutes being an American? How do you define being an American? it is almost impossible to do it in anything other than broad political, non-political terms. An American is one who, in fact, joined in a social compact, if you will, and decided that the way we are going to govern ourselves is through a Constitution, the symbol of which is most significantly the flag; a Constitution whereby we have set out the rules by which we will all seek to realize our dreams and settle our differences. This is very much unlike other countries.

For example, if tomorrow France became a monarchy, France would not change. You define a Frenchman by his or her ethnicity. The same with a Spaniard and so on. There is no other way to define an American, in my view, other than their adherence to a set of principles embodied in the Constitution, symbolized by the flag, the single, most unique symbol in America.

So I think it serves a purpose, a legitimate purpose, of being a symbol that pulls people together, that helps generate the kind of tolerance that is required in such a diverse society.

The second point I would like to make is that the decision in the *Johnson* case, *Texas* v. *Johnson*—and I will elaborate on this much more during the questioning period—is susceptible to being corrected by a statute, which I hope to be able to demonstrate to my colleagues before this entire matter is settled. And if I am correct, that this symbol of unity in this country can be protected by a statute, I think it is very unwise to go beyond the statute and begin to tamper with the Constitution. Arguably, if it is not possible, protection of that symbol is important enough to draft and pass a constitutional amendment. And I would argue that, theoretically, such an amendment could be drafted. I do not believe the one before us, however, meets that test, but one could be drafted without doing violence to the Bill of Rights.

But at a minimum, if we pass the statute—the House has passed the essence of the statute that I have proposed.

If we pass the statute and the President signs it, as long as the statute is on the books, it will be illegal to burn a flag. So, immediately, burning of the flag becomes illegal. Obviously, that can and will be challenged in the courts, and it seems to me we are taking no chance with a statute. If the statute passes, it becomes illegal. And only if it is declared unconstitutional are we once again, if you will, exposed. And then we can move swiftly, if that is the will of the Senate, to pass a constitutional amendment. But it seems to me prudence and caution are called for here and, I think, the statute can, in fact, meet the test that we have to meet.

[The statement of Senator Biden follows:]

Opening Statement
Flag Hearing

Senator Joseph R. Biden, Jr.
Tuesday, August 1, 1989
Senate Caucus Room

The Senate Judiciary Committee convenes this morning for its first hearing on the Supreme Court's decision in the case of Texas v. Johnson, and on the legislative measures that have been introduced in response to that decision.

It bears noting at the outset that the House Judiciary Committee -- based on the hearings it held a few weeks ago -- has already reported a statute that builds upon the legislation I've introduced in the Senate. I commend the committee and, in particular, Chairman Brooks and Mr. Edwards, for the leadership they have demonstrated on this important issue.

It should come as no surprise to anyone at this point that I, for one, believe that the physical integrity of the American flag can and should be protected. For me, the flag is the one symbol that brings together a land of people whose backgrounds are as diverse as the nations that comprise the earth on which we live.

We who inhabit this great land we call America form the most unique and heterogenous nation on earth. When we're young, we're taught in school and by our parents that our strength flows from our diversity. Ultimately, that is true, and our nation is all the better because of it. But initially, our diversity pushes us apart - it does not bring us together.

The fact that we are black and white does not generate confidence and warmth -- initially, it generates fear. The fact that we are Christian and Jew does not send us running into one another's embrace to herald our differences.

Mankind fears that which is different, and we as a people are different -- except in one very important way.

What holds us together is not our ethnicity, our culture, our religion or our race, but one overwhelming notion -- that we are, as a nation, more or less united on the means by which we can realize our dreams and on the rules and regulations that will guide us in our attempt to fulfill our dreams. Those rules and regulations are embodied in the Constitution -- a covenant, if you will -- the single most obvious, clear and unquestioned symbol of which is the American flag.

"We live by symbols," Oliver Wendell Holmes once observed. Those words were true when Justice Holmes wrote them and they're true now. And we have a symbol that is needed to unite this great nation -- this diverse nation -- and that symbol is the flag.

That is why two days after the Supreme Court's decision, I introduced my original legislation to prohibit flag burning. That legislation passed the Senate unanimously as an amendment to the Child Care Bill, which may be the subject of extended debate in the House. As a result, I re-introduced my bill, together with Senators William Roth and William Cohen, slightly modified after consultation with additional constitutional scholars. As of this date, there are more than 30 sponsors of our bill, Republican and Democrat, conservative and liberal.

I firmly believe that my legislation is consistent with the Supreme Court's decision in Texas v. Johnson, and that it would pass constitutional muster.

In the majority opinion, the court emphasized that the Texas law did not protect the physical integrity of the flag in all circumstances -- rather, it protected the flag only against those acts of physical destruction that would "cause serious offense to others." If no one was offended, then no criminal charges could be brought for burning a flag.

This meant that innocence or guilt under the statute depended upon "the communicative impact" of the action -- and historically the court has struck down legislation which does that.

In contrast, the legislation I've offered eliminates any reference to the communicative impact of the prohibited acts. In other words, prosecution under our bill will not depend on whether the flag is destroyed for communicative or noncommunicative purposes, or whether any particular group of people might applaud or condone what is being done.

Perhaps the best description of my legislation is that offered by Professor Geoffrey Stone, Dean of the University of Chicago law school and a witness here today. In his written statement, he says:

> "Unlike the Texas law invalidated in Johnson, the proposed legislation does not turn on the communicative impact of the prohibited conduct, it is not content-based, it is not directly related to the suppression of free expression and its constitutionality is thus not controlled by the principles that...dictated the outcome in Johnson."

We've been able to draft a statute like this with the help of several outstanding constitutional scholars. Their views cross the ideological spectrum, and each of their views have been taken into account in coming up with the exact wording of our bill.

The hearings that this committee will conduct during the next several weeks will be thorough, comprehensive and fair. They will address the legislation that I've introduced with more than 30 of my colleagues; the proposed constitutional amendments; and any other issues relating to the flag. Today's hearing will give us an excellent start -- we have a solid group of witnesses representing all the various points of view.

In closing, I urge my colleagues to continue to address and discuss this issue in non-partisan terms. Some on this committee are opposed to both the statute and the amendment; some are opposed to one and not the other; and some support both. Wherever each of us comes out, let our differences be substantive -- not partisan. For when it comes to the American flag, I am confident that every member of this committee -- regardless of his position -- believes in the cherished values that the flag embodies.

The Chairman. I will refrain from any further comments at this moment and yield to my colleague from Utah, since our colleague from South Carolina has already spoken.

OPENING STATEMENT OF SENATOR HATCH

Senator Hatch. Thank you, Mr. Chairman.

This is a wery important issue, and I think it has gotten people all over this country very excited that we would allow the desecration of the flag in this country the way it has been done. On the other hand, there are two sides to the argument.

In my view, Mr. Chairman, it cannot be seriously argued that the protection of the flag from physical desecration impairs the first amendment's principle of freedom of speech. That principle has never been absolute. Libel is actionable, even under the first amendment. Obecenity is not protected by the first amendment. A person cannot blare out his or her political views at 2 o'clock in the morning in a residential neighborhood and obtain first amendment protection.

You could give countless other illustrations where free speech is not protected under certain circumstances. So it is not a freedom that is deemed absolute. On the other hand, I want it to be as absolute as we can make it.

Protecting the flag from physical desecration does not prevent, it seems to me, a single idea or thought from being expressed. It does not interfere with the numerous ways of conveying an idea, through speech, use of placards, leaflets, newspapers and even more. It merely prevents conduct with respect to one object and one object only, and that is our flag.

We can withdraw that one unique object from physical abuse, and I assure you our freedom of speech will remain intact. Indeed, for years, for many years, a Federal statute and 48 State statutes did protect the flag. Can anyone identify actual harm to the first amendment during this time? Moreover, there is no slippery slope here because there is simply nothing else like our flag. I think the Supreme Court did make a mistake in *Texas* v. *Johnson*.

I became a cosponsor of S. 1338, Senator Biden's statutory response to *Texas* v. *Johnson*, because I thought it was important to register immediate concern about that decision. I am also a cosponsor of constitutional amendments to overturn the decision and protect the flag from physical desecration, including Senate Joint Resolution 169, which I introduced, as well as Senator Thurmond's proposal and the President's proposal.

Upon reflection, I have concluded that a constitutional amendment is absolutely necessary to ensure with certainty the validity of any statute banning flag desecration. I believe that it is simply unsound to try to overturn a Supreme Court interpretation of the Constitution by a simple statute.

I recall with particularity when Senator East brought up his human life statute. There were at least two people who spoke against that. One was myself and the other one was Robert Bork, because we felt that, frankly, that is not the way to overturn a Supreme Court decision.

I might add when other Senators have brought up so-called court-stripping amendments or amendments to limit the jurisdiction of the Supreme Court and/or the other courts in this country under article III, section 2, clause 2, that I have stood on the floor and argued against those type of approaches, even though I agreed with the substance of the statutory approach being offered by my colleagues.

Even a facially neutral statute is, at a minimum, at severe risk when applied to a person who desecrates the flag as part of a political expression after *Texas* v. *Johnson*. Why? Because the Supreme Court declared in that case that the Government's asserted interest in preserving the flag as a symbol of nationhood and national unity is insufficient to overcome a person's so-called right to burn the flag as part of expressive conduct. Indeed, it cannot be denied that the principle is not the only purpose in enacting the facially neutral statute, if we do so, is to prohibit excessive conduct that physically desecrates our flag, because this is the clear purpose of the statutory approach. That approach is extremely risky after *Texas* v. *Johnson*.

Moreover, I want to consider carefully whether a neutral blanket statute reaching all physical desecration such as S. 1338 is the one we ought to enact. I think a blanket statute may sweep too far. There are legitimate reasons to dispose of flags in a way that would seem to run afoul of such a statute. Yet any exception we write into a statute further undermines the constitutionality under *Texas* v. *Johnson*. The Court there noted that if a State were to forbid:

> Flag burning whenever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol—as a substitute for the written or spoken word * * *—only in one direction.

Now, this, the Court indicated, is impermissible. While the Court did not make this remark in the context of an otherwise blanket ban on flag desecration, I am deeply concerned that such a rationale would be used to invalidate just such a blanket statute.

A statute prohibiting all physical desecration of the flag without regard to the reason for the desecration—that is, whether it has an expressive purpose—is certain to be unconstitutional as applied to a flag desecration undertaken to "express" a point of view after *Texas* v. *Johnson*. In short, anyone who inadvertently drags the flag through the mud can be prosecuted after *Johnson*. But in my view, someone who drags it through the mud as a part of a political protest cannot be constitutionally prosecuted. This result occurs because the Court just told us that the uniqueness of the flag as a national symbol does not constitute a sufficient ground for prohibiting expressive conduct that takes the form of burning Old Glory.

Now, in light of these concerns, I intend to withdraw my cosponsorship of S. 1338. A constitutional amendment is the safest, surest, and most permanent way of achieving the protection of the flag that the supporters of a statute, it seems to me their approach really will not work. I look forward to hearing their explanation as to how a statute which prohibits flag desecration in all or some instances is not a threat to the first amendment while a constitutional amendment achieving the same thing is such a threat. I note that the Federal statute, 18 U.S.C. 700, has not yet been before the Court nor has it been struck down by the Court.

If we enact a constitutional amendment, this statute will already be on the books. Thus, there will be no gap in the protection of the flag between the effective date of the amendment and the enactment of a new statute.

Thank you, Mr. Chairman.

[The prepared statement of Senator Hatch follows:]

From the office of

SEN. ORRIN HATCH

Washington, D.C. 20510

August 1, 1989 Contact: Paul Smith, 202/224-9854

STATEMENT OF SEN. ORRIN HATCH
BEFORE THE U.S. SENATE COMMITTEE ON THE JUDICIARY
HEARING ON THE DESECRATION OF THE AMERICAN FLAG

Washington, D.C. — Thank you, Mr. Chairman. Each time the American people see the flag burned or otherwise desecrated, the overwhelming majority of Americans will burn with anger, and rightly so. The American people revere the flag as a unique symbol of our country and of the freedom we enjoy as Americans. It is the one symbol that unites a very diverse people in a way nothing else can. Despite our differences of party, politics, philosophy, religion, ethnic background, economic status, social status, or geographic region, the flag forms a unique, common bond among us.

So strong is the attachment of the people to the Stars and Stripes, it may be said that the flag is a representation of our country in many intangible ways. Those who believe that the American people's deep-seated and abiding regard for the flag will wane or that Americans do not expect Congress, clearly and with certainty, to safeguard the flag are just kidding themselves.

Justice Stevens, dissenting in Texas v. Johnson, aptly stated, " a country's flag is a symbol of more than 'nationhood and national unity.' I also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas...

"[The American flag] ... is a symbol of freedom, of equal opportunity, of religious tolerance, and of goodwill for other peoples who share our aspirations ...."

As Justice White has written, "One need not explain fully a phenomenon to recognize its existence and in this case to concede that the flag is an important symbol of nationhood and unity, created by the Nation and endowed with certain attributes." Smith v. Goguen, 415 U.S. 566, 587 (White, J., concurring). Chief Justice Rehnquist wrote, "The significance of the flag, and the deep emotional feelings it arouses in a large part of our citizenry, cannot be fully expressed in the two dimensions of a lawyer's brief or of a judicial opinion." Smith v. Goguen, 415 U.S. at 602 (1974) (Rehnquist, J., dissenting). The Chief Justice then made a point that rang particularly true for me as Ranking Member of the Subcommittee on Patents, Copyrights, and Trademarks: "...if the government may create private proprietary interests in written work and in musical and theatrical performances by virtue of copyright laws, I see no reason why it may not...create a similar governmental interest in the flag by prohibiting even those who have purchased the physical object from impairing its physical integrity. For what they have purchased is not merely cloth dyed red, white, and blue, but also the one visible manifestation of two hundred years of nationhood..." Id. at 602-603.

In my view, Mr. Chairman, it cannot be seriously argued that the protection of the flag from physical desecration impairs the First Amendment's principle of freedom of speech. This freedom has never been deemed absolute. Libel is actionable, even under the First Amendment. Obscenity is not protected under the First Amendment. A person cannot blare out his or her political views at two o'clock in the morning in a residential neighborhood and claim First Amendment protection.

Protecting the flag from physical desecration does not interfere with the numerous ways of conveying an idea — through speech, use of placards, leaflets, newspapers, and more. It merely prevents conduct with respect to one object, and one object only, our flag. We can withdraw that one unique object from physical abuse and, I assure you, our freedom of speech will remain intact. Indeed, for many years, a federal statute and 48 statutes did protect the flag. Can anyone identify actual harm to the First Amendment during this time?

Moreover, there is no slippery slope here — because there is simply nothing else like our flag.

I think the Supreme Court made a mistake in Texas v. Johnson. I became a cosponsor of S. 1338, Sen. Biden's statutory response to Texas v. Johnson because I thought it was important to register immediate concern about that decision. I am also a cosponsor of constitutional amendments to overturn the decision and protect the flag from physical desecration, including S.J. Res. 169, which I introduced, as well as Sen. Thurmond's proposal, and the President's proposal.

Upon reflection, I have concluded that a constitutional amendment is absolutely necessary to ensure with certainty the validity of any statute banning the flag desecration. I believe it is unsound to try to overturn a Supreme Court interpretation of the Constitution by a statute.

Even a facially neutral statue is, at a minimum, a severe risk when applied to a person who desecrates the flag as part of a political expression, after Texas v. Johnson. Why? Because the Supreme Court declared in that case that the government's asserted "interest in preserving the flag as a symbol of nationhood and national unity" is insufficient to overcome a person's so-called right to burn the flag as part of expressive conduct. Indeed, it cannot be denied that the principal, if not the only, purpose in enacting a facially neutral statute, if we do so, is to prohibit expressive conduct that physically desecrates the flag. Because this is the clear purpose of the statutory approach, that approach is extremely risky after Texas v. Johnson.

Moreover, I want to consider carefully whether a neutral, blanket statute reaching all physical desecration, such as S. 1338, is one we ought to enact. I think a blanket statute may sweep too far. There are legitimate reasons to dispose of flags in a way that would seem to run afoul of such statute. Yet, any exception we write into a statute further undermines its constitutionality under Texas v. Johnson. The Court there noted if a state were to forbid "flag-burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role — as where, for example, a person ceremoniously burns a dirty flag — we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol — as a substitute for the written or spoken word... — only in one direction." Slip opinion at 18, 19. This, the Court indicated, is impermissible. While the Court did not make this remark in the context of an otherwise blanket ban on flag desecration, I am deeply concerned that such a rationale would be used to invalidate just such a blanket statue.

In light of these concerns, I intend to withdraw my cosponsorship of S. 1338. An amendment is the safest, surest, and most permanent way of achieving the protection of the flag that the supporters of a statute only approach also favor. I look forward to hearing their explanation as to how a statute which prohibits flag desecration in all or some instances is not a threat to the First Amendment, while a constitutional amendment achieving the same thing is such a threat. I note that the federal statute, 18 U.S. C. Section 700, has not yet been before the Court or struck down by it.

If we enact a constitutional amendment, this statute will already be on the books. Thus, there will be no gap in protection of the flag between the effective date of an amendment and the enactment of a new statute.

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The **Chairman**. Thank you very much, Senator.

The Senator from Massachusetts, Senator Kennedy.

OPENING STATEMENT OF SENATOR KENNEDY

Senator **Kennedy**. Thank you, Mr. Chairman.

First of all, I want to commend you for holding these hearings on the proposed responses to the Supreme Court's recent decision striking down the Texas flag-burning law. Whether waving at the front of a Fourth of July parade or covering the coffin of a fallen soldier, the flag symbolizes all that is best about America. Flying high, it has spurred us to our loftiest national achievements; at half staff, it has comforted us in our deepest national sorrows. Anyone who burns the flag casts contempt on our country, our heritage, and our history, and deserves the condemnation of every American.

But the issue in the *Johnson* case—and in these hearings—is not the flag, but the constitutional freedoms for which it stands. First among these is freedom of speech. The concept of free and open debate, at the heart of our democracy, will be an empty promise if the Government can censor those who criticize it. The Founders understood that, and they adopted the Constitution and the Bill of Rights to protect the freedoms of all Americans, including the fundamental freedom of citizens to criticize their Government and the elected officials who represent them.

The Constitution does not just protect those whose views we share. It also protects those whose views we hate. We have all heard people shouting extremist views with which we disagree. When we do, we shake our heads and say, "It's a free country." It is a free country, because the Constitution makes it one.

That constitutional freedom was the issue in the *Johnson* case. Gregory Johnson committed a despicable act. He burned the flag to express his anger at the President. But Johnson was not prosecuted for starting a fire or inciting a breach of peace. He was prosecuted under a Texas law which made it a crime to mistreat the flag in a way that would seriously offend others. He was prosecuted because he used the flag to send a message with which the vast majority of Americans disagree.

The Supreme Court ruled that the Constitution prohibited the State of Texas from prosecuting Johnson for his offensive message. I previously expressed my agreement with the Court's ruling. As Justice Brennan explained in his opinion for the Court:

> The Court's decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism, such as Johnson's, is a sign and source of our strength.

Or as Justice Kennedy succinctly stated in his concurring opinion, "It is poignant but fundamental that the flag protects those who hold it in contempt."

Gregory Johnson's actions were deplorable, and the Court's decision that he must go free generated understandable public outrage. Those circumstances presented a critical test of leadership for us all. Unfortunately, President Bush failed that test.

The President's initial instinct was to acquiesce in the decision and defend the Supreme Court for protecting the freedom of speech guaranteed by the Constitution. He could have said nothing more and watched the clamor settle down. Instead, after lunch with Lee Atwater, the chairman of the Republican National Committee, the President launched a high-profile campaign to enact a constitutional amendment to overrule the Court's decision.

As a Presidential candidate, George Bush waged a partisan political campaign around the flag during the election of 1988. But it is a very different thing for George Bush as President of all the people to use his high office to wage a similarly partisan and similarly political campaign around the flag in 1989.

The Atwater-Bush amendment will do more violence to the Constitution than Gregory Johnson could possibly have hoped to accomplish. For the first time in 200 years, an amendment would be enacted that creates an exception to the guarantee of freedom of speech protected by the Constitution.

In carving a loophole in the first amendment, the proposal will also undercut the remaining freedoms. The Constitution is the seamless fabric of our liberties. If we pull one thread, other freedoms will begin to unravel, too.

Throughout our history, freedom of expression has rested on the notion that the Constitution, if it means anything, requires us to tolerate views with which we strongly disagree. That is what gives American its true strength. But if we set the precedent of putting an asterisk on the first amendment to protect the sensibilities of those of us who are offended by flag burning, what will we say the next time the public is offended by some other minority view or some other person's exercise of the freedom the Constitution is supposed to protect? Once we abandon the broad tolerance that the Constitution requires, even for offensive views, there is no fair way to draw the line.

For these reasons, I regard the proposed amendment as a serious danger to the basic freedoms protected by the Constitution, and I urge my colleagues to reject it. After two centuries of unparalleled success for our free society, ours should not be the generation that begins to dismantle our constitutional freedoms.

Finally, I recognize the proposed statutory alternative before the committee is supported in good faith by many who see it as the only means of heading off a constitutional amendment. But I must oppose the statute as well.

Possibly, since the proposed legislation is not explicitly aimed at expression, it will be upheld by a majority of the Supreme Court against a challenge to its constitutionality. But because the bill bars all defacing of the flag, regardless of the context, it will criminalize a great deal of relatively trivial behavior, such as throwing out a flag printed on a paper napkin. It will change the flag from a treasured symbol to a Government-regulated icon.

Once the image of a flag is created anywhere, its owner could change it or dispose of it only at the risk of criminal prosecution. That kind of intrusive governmental regulation is foreign to our traditions as a free people, and it is questionable public policy.

As a practical matter, innocent activity like throwing out a paper napkin is unlikely to be prosecuted. It is likely, however, that the proposed law will become a tool for selective prosecution of those who use the flag to express unpopular opinions. In my view, that would be clearly unconstitutional.

The American flag will always be revered because of the Nation it symbolizes and because of the extraordinary sacrifices made by brave men and women to preserve the freedoms for which it stands. We do not need to amend the Constitution or pass a law to honor the flag. Desecrating the Constitution is no way to prevent desecration of the flag. America's flag never flies higher than when we respect the values for which it stands. By reaffirming that principle now, we will place the flag far beyond Gregory Johnson's puny power to insult it.

The CHAIRMAN. Thank you very much.

Senator Simpson.

OPENING STATEMENT OF SENATOR SIMPSON

Senator SIMPSON. Mr. Chairman, you are going to have to get a bigger table next time; I cannot get my legs under here.

The CHAIRMAN. Do you want have your legs cut down?

Senator SIMPSON. No. People have been doing that for weeks. [Laughter.]

They've been cutting my legs off everywhere I have been going, lately.

Mr. Chairman, I look forward to a very full and fair hearing. I think it will be excellent to have. I really do not have a formal statement, but I am very interested in hearing the testimony—I really do mean that—from constitutional scholars and experts.

Congress has to come to a decision as to an appropriate means to address the problem, and we can get that from our constituents. They say, What are you going to do about that? And I think that they feel very strongly about it. Yes, there are those who would make political partisan effort out of this, but I am surprised at my friend from Massachusetts speaking about the "Atwater lunch" and the "Atwater-Bush" amendment. Come on. That is really off the wall.

We do a little radio program together. He will probably nail me to the wall next time. But I do not think that has any appropriate place here. George Bush feels strongly about it. It helped him get elected President. He did get elected President. He fought under that flag. He crashed into the sea while piloting an aircraft under that flag. I do not think that is anything to be in here at all. The universal, nationwide reaction of all Americans does not fit with an effort to politicize the reaction of the administration or the Congress of the United States.

Then over in the House, you know: Talk about partisanship. I mean, they are ramming it around over there as to whether it was a statute or a constitutional amendment, to see who they could catch in the cracks. What an exercise.

Let's get at it and try to listen to what we should do. We have to use caution, obviously, when amending the Constitution, especially when the amendment affects the Bill of Rights. I have heard some remarkable proposals. The former Democratic Governor of Wyoming, a great friend of mine, suggested that if the flag was an "item of national property," then you have things in our statutes that protect national property from defacement or defilement. That is an interesting thought. Maybe somebody will bring that up. I think that is worth considering.

But we have to use caution. The statutory approach is simple, speedy, and less intrusive. That is worth looking at. The decision itself contains the phrase "express conduct," and I will be interested to hear more of that. And then the reference back to the old phrase of "fighting words." I think at some point in time that may come into being where fighting words are directly involved—and, of course, that would have led to a different decision in the Court's determination, I think.

It is a remarkable opinion, both the dissents and the majority. Anyway, a constitutional amendment is obviously going to involve the people in a more deliberative process, and I think that is always important. Very important.

We have an extraordinary daily assault on the things that have made the country strong, and those things are a pluralistic society, a common public culture, a common flag, and a common language. We see assaults on those issues continually. And those are things for us to try to handle in our very imperfect way. But perhaps, as some have suggested, we should proceed along both paths and drop the amendment process if the statute proves effective.

I am ready to listen and learn, and I look forward to seeing what we can come up with that is rational and sensible and not partisan, and that meets the test of what the people seem to be very concerned about; that is, a squirrel like this guy burning the flag. And he had a right to do that under the Constitution, and he did. And that is the strength of it, and now our job is to see how we protect the flag without prohibiting other expressive conduct, and I think we can do that. I would like to think we could.

The **Chairman**. Thank you.

The Senator from Ohio, Senator Metzenbaum.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator **Metzenbaum**. Mr. Chairman, most Americans, including myself, are deeply offended at the burning of our national flag. But I propose we begin this hearing by being honest with the American people. Sometimes the solutions to a problem are far worse than the problem itself. This is surely true in attempting to make flag desecration a crime.

Two proposals are before us today. One is a constitutional amendment which would weaken the Bill of Rights for the first time in our history. The other is legislation that would make it a crime to dispose of a small paper flag after a Fourth of July picnic. The constitutional amendment would require the kind of mental loyalty test that is the hallmark of Communist countries and right-wing dictators. The legislation would criminalize routine, completely harmless conduct, in the privacy of one's own home.

By the time these hearings are over, I hope that we in the Congress and the President will have the courage to say to the American people we were wrong. We were stampeded by politics into supporting proposals that harm our Nation far more than a handful of offensive flag burners. Our country is just as strong, Americans just as patriotic, as before the Supreme Court's decision. There were a handful of flag burners before the decision, and there will be a handful of them after anything we do here.

What the country is witnessing in this historic caucus room is not the protection of American values or the strengthening of our security. It is the politics of patriotism. We are caught up in a crass competition about who loves the flag more. We want to use the flag against our opponent in the next election, and we want to be sure it is not used against us. While many Americans were troubled by the Supreme Court's decision, I have been gratified to read so many editorials and letters that reflect a strong and deeply felt commitment to freedom of speech.

Political conservatives, such as James Kilpatrick and George Will, have spoken out against an amendment. Small-town newspapers all over Ohio have editorialized in favor of tolerating dissent. The Daily Advocate of Greenville, OH, wrote:

> The flag is not freedom. It is not the United States. It is the symbol of both. A very important symbol, but not more important than the protection of free expression.

So I say to my fellow Members of Congress, if you are rushing to jail flag burners only because you think that the public demands it, think again. But we are not simply engaged in a wasteful exercise in the politics of patriotism. Much, much more is at stake. In 200 years, we have never adopted a constitutional amendment limiting individual freedom. We have passed through a Civil War, two World Wars, and a Great Depression, without ever weakening the original Bill of Rights. If we succumb to shallow politics now, how long will it be until we pass the next amendment, and the next, and the next?

The Bill of Rights has stood the test of time because the American people have known that the majority today may find itself a vulnerable minority tomorrow. We are poised to taste the forbidden fruit of reducing individual liberty. If we begin to erode the Bill of Rights now, we only make it easier to weaken it again the next time we are offended by a shrill few. No nation has no jealously guarded the principle that everyone can have his or her say. It is no accident that the Founders listed freedom of speech and religion as the first of the great Bill of Rights. Each person can speak out even if we hate the message and despise the messenger.

Millions around the world look to us as the inspiration for what their society might someday become. Thousands are willing to die to win the freedoms we now have. Try to explain to a group of Chinese or Soviet students our commitment to free speech, our love of individual freedom. What example is more American, more faithful to American values? Jailing flag burners or tolerating them?

Deep down, we know that tolerating even outrageous protests is truer to our tradition than jailing those who offend us. We send the wrong message to the world when we choose forced patriotism over our love of freedom. The American people are the most patriotic in the world because we love our country. But what is the value of patriotism forced by the threat of prison? What is the worth of respect for the flag if we make disrespect for it a crime?

Love of country must be genuine if it is to have meaning. There is no disrespect for national symbols in the Soviet Union, Iran, or North Korea. Would we for a moment equate respect for the Chinese flag with true love of country? Of course not. The light of patriotism does not shine through when it is compelled by the point of a rifle.

How will the next generation look back on us if we pass this amendment? How will they compare it with the original Bill of Rights or the great post-Civil War amendments? Will they be proud of us for weakening the Bill of Rights for the first time in history so that flag burners can be punished? No. They will be ashamed at such a blot on the Constitution. They will say: How sad that the national leaders of that day succumbed to crass politics. How sad that they did not have the courage to do what was right.

And will we be proud of this amendment? Will we be proud to say about the 101st Congress: We could not pay our bills but we punished flag burners? We lost the war on drugs but we weakened the Bill of Rights? We let our school deteriorate but we passed a politically motivated constitutional amendment?

To those who would take solace in passing legislation in order to avoid amending the Constitution, I urge you to reconsider. Why should we impose on the American people a strange and unworkable statute that makes harmless private behavior a crime? If you believe there is a political tidal wave that you cannot resist, you are wrong. The American people are wiser than you think.

Like the Olympic runner, each generation takes the torch of liberty from the last one. Each must carry it during its years of responsibility for the Nation's destiny. For 200 years, no generation has let politics rise above the Bill of Rights. I hope that ours is not the generation that drops the torch.

The CHAIRMAN. Thank you, Senator.

The Senator from Iowa, Senator Grassley.

OPENING STATEMENT OF SENATOR GRASSLEY

Senator GRASSLEY. Thank you, Mr. Chairman.

I want to add my thanks to you for holding this first of four scheduled hearings, and I also want to put a longer statement in the record.

I want to say at the outset that I do not believe that any of the members of this committee take lightly the issue before us, nor do I believe that many consider our efforts a waste of time. As a part of its many responsibilities, the Congress has the duty to weigh very carefully the possible consequences of its action whenever it considers proposals, whether they be in the form of a proposed constitutional amendment or proposed statutes, that would modify in some way any Supreme Court decision, not just a Supreme Court decision on freedom of speech. I believe that this series of hearings is consistent with that duty.

We all know that in the *Texas* v. *Johnson* case—which was decided by a bare 5-to-4 majority—the Supreme Court decided that burning the American flag is protected by the free speech clause of the first amendment to the Constitution. We are here today because the vast majority of Americans feel the Supreme Court ruled wrongly in the *Johnson* case.

Today, because of the furor caused by the Supreme Court's June decision, we are considering various proposals that will, in my view, not change the Constitution, as many critics have been charging, but that will return us to the status quo—what the law was before the Court's *Texas* v. *Johnson* decision.

We all know that the first amendment was added to the Constitution to ensure that individuals would be free to engage in robust, open, and public debate, and without any interference or threat from some governmental action.

Consequently, the first amendment protects speech that is outrageous, speech that questions the very foundations of our Republic, and speech that is just plain out of sync with the vast majority of Americans.

Even speech that contains views held by just one individual is protected.

That is the way it ought to be.

And subsequent decisions by the Supreme Court have determined that even some conduct or gestures in conjunction with speech should enjoy the protection of that first amendment.

Make no mistake about it: There should be no restrictions on the legitimate free speech rights of Americans.

However, the drafters of the first amendment did not mean to protect speech to the extent that "anything goes." The first amendment does not allow for the publication, in whatever form, of every kind of speech, utterance, expression, or activity.

I believe that although the flag is, indeed, an object, it is not just another piece of cloth or fabric or just another identifying banner. I believe that to think of it as such is to trivialize it.

The flag is the unique symbol and manifestation of our nationhood. And even though it is not a sacred icon or other item that has taken on a religious quality, it does, in my view, deserve to be protected.

As such, in my opinion, those who burn a flag are engaging in "expression" or "conduct" that takes on characteristics different than speech.

Many of my constituents have asked me: What legitimate, fundamental, or essential right is infringed upon when all manner of verbal or nonverbal expression of speech can be uttered, for whatever purpose, without fear of reprisal or without prosecution by the State, up to but not including the physical mistreatment of the flag?

I believe that we are obliged to respond to the Supreme Court and reestablish the status quo prior to its decision in *Texas* v. *Johnson*. So in the pursuit of this belief, I look forward to the testimony we hear today and look forward to moving to return this issue to the status quo before the *Johnson* case.

Thank you, Mr. Chairman.

[The prepared statement of Senator Grassley follows:]

WRITTEN STATEMENT OF SENATOR CHARLES E. GRASSLEY REGARDING PROPOSALS BEFORE THE SENATE JUDICIARY COMMITTEE TO PROTECT THE PHYSICAL INTEGRITY OF THE UNITED STATES FLAG

AUGUST 1, 1989

MR. CHAIRMAN, AS A CO-SPONSOR OF THE PRESIDENT'S PROPOSED CONSTITUTIONAL AMENDMENT TO PROTECT THE PHYSICAL INTEGRITY OF THE FLAG, AS THE AUTHOR OF MY OWN CONSTITUTIONAL AMENDMENT TO PROTECT THE FLAG, AND AS A CO-SPONSOR OF THE CHAIRMAN'S PROPOSED STATUTORY SOLUTION, I WANT TO ADD MY THANKS TO YOU FOR HOLDING THIS FIRST OF FOUR SCHEDULED HEARINGS -- IN ACCORDANCE WITH THE SENATE'S JULY 14th UNANIMOUS CONSENT AGREEMENT -- ON THE VARIOUS PROPOSALS BEFORE OUR COMMITTEE TO PROTECT THE PHYSICAL INTEGRITY OF THE UNITED STATES FLAG.

THE EXPEDITIOUS CONSIDERATION YOU HAVE GIVEN THIS ISSUE IS APPRECIATED BY ALL OF US WHO FEEL VERY DEEPLY ABOUT THE CONSEQUENCES OF THE JUNE 21, 1989 SUPREME COURT DECISION IN TEXAS v. JOHNSON.

I WANT TO SAY AT THE OUTSET THAT I DO NOT BELIEVE THAT ANY OF THE MEMBERS OF THIS COMMITTEE TAKE LIGHTLY THE ISSUE BEFORE US, NOR DO I BELIEVE THAT MANY CONSIDER OUR EFFORTS A FOOLISH WASTE OF TIME.

AS A PART OF ITS MANY RESPONSIBILITIES, THE CONGRESS HAS THE DUTY TO WEIGH VERY CAREFULLY THE POSSIBLE CONSEQUENCES OF ITS ACTIONS WHENEVER IT CONSIDERS PROPOSALS --EITHER IN THE FORM OF A CONSTITUTIONAL AMENDMENT OR PROPOSED STATUTES -- THAT WILL MODIFY IN SOME WAY A SUPREME COURT DECISION.

I BELIEVE THAT THIS SERIES OF HEARINGS IS CONSISTENT WITH THAT DUTY.

WE ALL KNOW THAT IN THE TEXAS v. JOHNSON CASE, BY A BARE FIVE-TO-FOUR MAJORITY, THE SUPREME COURT DECIDED THAT BURNING THE AMERICAN FLAG IS PROTECTED BY THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT TO THE CONSTITUTION.

TODAY, BECAUSE OF THE FUROR CAUSED BY THE SUPREME COURT'S JUNE DECISION, WE ARE CONSIDERING VARIOUS PROPOSALS THAT WILL, IN MY VIEW, NOT CHANGE THE CONSTITUTION -- AS MANY CRITICS HAVE BEEN CHARGING -- BUT THAT WILL RETURN US TO THE STATUS QUO, BEFORE THE COURT'S TEXAS v. JOHNSON DECISION.

WE ALL KNOW THAT THE FIRST AMENDMENT WAS ADDED TO THE CONSTITUTION TO INSURE THAT INDIVIDUALS WOULD BE FREE TO ENGAGE IN ROBUST, OPEN, AND PUBLIC DEBATE, AND WITHOUT INTERFERENCE OR THREAT FROM SOME GOVERNMENTAL SANCTION.

CONSEQUENTLY, THE FIRST AMENDMENT PROTECTS SPEECH THAT IS OUTRAGEOUS, SPEECH THAT QUESTIONS THE VERY FOUNDATIONS OF THE REPUBLIC, AND SPEECH THAT IS JUST PLAIN OUT-OF-SYNC WITH THE VAST MAJORITY OF THE AMERICAN PEOPLE.

EVEN SPEECH THAT CONTAINS VIEWS HELD BY JUST ONE INDIVIDUAL IS PROTECTED.

AND, SUBSEQUENT DECISIONS BY THE SUPREME COURT HAVE DETERMINED THAT EVEN SOME CONDUCT OR GESTURES IN CONJUNCTION WITH SPEECH, SHOULD ENJOY THE PROTECTION OF THE FIRST AMENDMENT.

MAKE NO MISTAKE ABOUT IT: THERE SHOULD BE NO RESTRICTIONS ON THE LEGITIMATE FREE SPEECH RIGHTS OF AMERICANS.

HOWEVER, THE DRAFTERS OF THE FIRST AMENDMENT DID NOT MEAN TO PROTECT SPEECH TO THE EXTENT THAT "ANYTHING GOES". THE FIRST AMENDMENT DOES NOT ALLOW FOR THE PUBLICATION -- IN WHATEVER FORM -- OF EVERY KIND OF SPEECH, UTTERANCE, EXPRESSION, OR ACTIVITY.

FOR INSTANCE, IN CHAPLINSKY v. NEW HAMPSHIRE, 315 U.S. 568 (1942), THE SUPREME COURT DETERMINED THAT THERE IS NO CONSTITUTIONAL PROTECTION FOR "THE LEWD AND OBSCENE, THE PROFANE, THE LIBELOUS, AND THE INSULTING OR 'FIGHTING WORDS' -- THOSE WHICH BY THEIR VERY UTTERANCE INFLICT INJURY OR TEND TO INCITE AN IMMEDIATE BREACH OF THE PEACE."

IN THAT SAME CASE, THE COURT ALSO DETERMINED THAT 'FIGHTING WORDS' "ARE NO ESSENTIAL PART OF ANY FREE EXPOSITION OF IDEAS, AND ARE OF SUCH SLIGHT SOCIAL VALUE AS A STEP TO TRUTH THAT ANY BENEFIT THAT MAY BE DERIVED FROM THEM IS CLEARLY OUTWEIGHED BY THE SOCIAL INTEREST IN ORDER AND MORALITY".

I BELIEVE THAT ALTHOUGH THE FLAG IS INDEED AN OBJECT, IT IS NOT JUST ANOTHER PIECE OF CLOTH OR FABRIC OR JUST ANOTHER IDENTIFYING BANNER. I BELIEVE THAT TO THINK OF IT AS SUCH IS TO TRIVIALIZE IT.

THE FLAG IS THE UNIQUE SYMBOL AND MANIFESTATION OF OUR NATIONHOOD. AND EVEN THOUGH IT IS NOT A SACRED ICON OR OTHER ITEM THAT HAS TAKEN ON A RELIGIOUS QUALITY, IT DOES, IN MY VIEW, DESERVE TO BE PROTECTED.

AS SUCH, IN MY OPINION, THOSE WHO BURN A FLAG OR WHO MISTREAT A FLAG IN ANY MANNER ARE ENGAGING IN "EXPRESSION" OR "CONDUCT" THAT TAKES ON THE CHARACTERISTICS OF 'FIGHTING WORDS'.

IT DOES NOT DEFY COMMON SENSE TO BELIEVE THAT LEFT UNPROTECTED, A DEMONSTRATOR OR GROUP OF DEMONSTRATORS WHO PHYSICALLY MISTREAT THE FLAG AS A PART OF SOME PROTEST WILL CAUSE ONLY ONE RESULT: INFLAMING THE PASSIONS OF MOST ANY GROUP OF AMERICANS, INCLUDING THOSE WHO HAVE RISKED THEIR LIVES IN ORDER THAT THIS NATION REMAIN -- NOT ONLY INDEPENDENT AND WHOLE -- BUT TRUE TO THE IDEALS OF FREEDOM AND LIBERTY THAT ARE CONTAINED IN THE DECLARATION OF INDEPENDENCE AND THE CONSTITUTION.

I ALSO HAPPEN TO BELIEVE THAT WHEN WE ALLOW THE FLAG TO BE BURNED, WE ESPECIALLY INSULT THOSE WHO -- IN DEFENSE OF THESE IDEALS -- HAVE MADE THE ULTIMATE SACRIFICE.

ALLOW ME TO READ FROM A MEMORIAL DAY SPEECH GIVEN IN MY STATE OF IOWA IN 1895. THE REMARKS ARE BY JIM BETHARD OF CLERMONT, IOWA.

MR. BETHARD WAS A VETERAN OF THE CIVIL WAR. IN 1862, HE ANSWERED PRESIDENT LINCOLN'S CALL FOR 600,000 VOLUNTEERS, AND ENTERED THE WAR AS A PRIVATE. IN 1865, HE WAS MUSTERED OUT AT THE SAME RANK.

JIM BETHARD SAID:

"WITH THE SUCCESSION OF MOVING AND STRONGLY CONTRASTING EVENTS THAT COMPOSE THE HISTORY OF A NATION'S LIFE, THE NATIONAL FLAG IS SO CLOSELY ASSOCIATED AS TO BECOME, IN MEN'S MINDS, THE EMBLEM AND VISIBLE PRESENCE OF THE NATION, PERSONIFIED."

"IT FLOATS TRANQUILLY OVER THE TURNING POINTS OF BATTLES WHICH DETERMINE THE NATION'S EXISTENCE, CROWNING ITS TRIUMPHS, GRACING ITS FESTIVITIES, DRAPING ITS HALLS OF LEGISLATION AND JUSTICE, DROOPING IN ITS DEFEATS, AND SHROUDING THE DEAD BODIES OF ITS HEROES."

"IF, LIKE A MIRROR, THE FLAG COULD REFLECT THE SCENES IT HAS BEHELD, IF IT COULD REFLECT THE VOICES IT HAS HEARD, IT WOULD REPRODUCE THE HISTORY OF THE PAST AND THE PROWESS OF INDIVIDUALS IN ENDLESS DETAIL."

"... IT IS PROPER ... [TO INCULCATE] A SPIRIT OF PATRIOTISM AND LOVE FOR THE OLD FLAG IN THE HEARTS OF THE YOUNG, THE COMING MEN AND WOMEN, FOR IN A REPUBLICAN FORM OF GOVERNMENT THE LOYALTY OF ITS PEOPLE IS THE ONLY GUARANTEE OF ITS PERPETUITY."

"IT HAS BEEN TRULY SAID THAT ETERNAL VIGILANCE IS THE PRICE OF LIBERTY ... THEN LET US BE VIGILENT AND NOT MISS AN OPPORTUNITY TO TEACH LESSONS OF PATRIOTISM AND LOVE OF THE OLD FLAG AND THE INSTITUTIONS IT REPRESENTS TO THOSE WHO ARE SHORTLY TO BECOME ITS GUARDIANS."

MR. CHAIRMAN, THIS YEAR, THE SUPREME COURT LOWERED THE FLAG OF WHICH JIM BETHARD SPOKE SO ELOQUENLTY 94 YEARS AGO.

MANY OF MY CONSTITUENTS HAVE ASKED ME: WHAT LEGITIMATE, FUNDAMENTAL, AND ESSENTIAL RIGHT IS INFRINGED UPON -- WHEN ALL MANNER OF VERBAL AND NON-VERBAL EXPRESSION OF SPEECH CAN BE UTTERED FOR WHATEVER PURPOSE WITHOUT FEAR OF REPRISAL OR PROSECUTION BY THE STATE -- UP TO BUT NOT INCLUDING THE PHYSICAL MISTREATMENT OF THE FLAG ?

I BELIEVE THAT WE ARE OBLIGED TO RESPOND TO THE SUPREME COURT AND RE-ESTABLISH THE STATUS QUO PRIOR TO ITS DECISION IN TEXAS v. JOHNSON.

I LOOK FORWARD TO THE TESTIMONY WE WILL BE HEARING TODAY.

THANK YOU.

The CHAIRMAN. Thank you.

The Senator from Illinois, Senator Simon.

OPENING STATEMENT OF SENATOR SIMON

Senator SIMON. Thank you, Mr. Chairman.

I think the word used by our colleague from Wyoming, "caution," is the word that we ought to be paying attention to as we determine what to do. I am a little old-fashioned. I probably got no greater thrill when I was in the service than being at a football game when they played the Star Spangled Banner and raised the flag. When I saluted it did something to me. I am very proud of that flag, as I am proud of this Capitol building and a great many other things. Had I been a member of the Court, I would have voted with the minority.

Justice Hugo Black, the all-time champion of freedom of speech, who even believed it was unconstitutional to have libel laws—an idea which, fortunately, has not prevailed—but Justice Hugo Black very specifically in a Court decision said freedom of speech would not include the freedom to burn a flag. I think there is a difference between conduct and speech that the courts can determine.

I think we should be very, very careful that because one person burns a flag, and there is a 5-to-4 decision of the U.S. Supreme Court, then we suddenly rush in to amend the Constitution. Throughout our history, we have had a series of attempts to amend the Constitution following unpopular decisions by the courts. At one point we almost had a constitutional amendment to outlaw polygamy in this country. But we handled it in other ways without an amendment to the Constitution.

I think we can handle this question without a constitutional amendment. I have great respect for the flag, but I also have great respect to the Constitution. Let us not out of reverence for one do damage to the other.

The CHAIRMAN. Thank you.

The Senator from New Hampshire, Senator Humphrey.

OPENING STATEMENT OF SENATOR HUMPHREY

Senator HUMPHREY. Thank you, Mr. Chairman.

It seems to me that it comes down to this: A statute will not work because the Court will overturn it the first time a case comes along that clearly involves desecration meant as political expression. That leaves a constitutional amendment.

By the way, on that first point, that a statute will not work, I hope that somebody can persuade me to the contrary because I would like to buy off on that easy out. But I do not think it will do. I do not think it will work. But I am open to persuasion on that point on the basis of logic.

Let me address the point of a constitutional amendment. Clearly, the Founders meant for the Constitution to be amendable. But amending must always be viewed as a radical remedy. There have been radical wrongs that demanded such a radical remedy: for example, slavery; for example, denial of equal protection of the law; for example, denial of the right to vote on account of race, color, or previous condition of servitude; for example, denial of the right to vote on account of sex; for example, denial of the right to vote by reason of failure to pay any poll tax or other tax. These were radical wrongs demanding a radical remedy.

But does the comparatively rare desecration of our flag merit the radical remedy of amending the Constitution? Further, does this rare act of desecration merit amending of the first amendment—that precious bedrock of our freedom? Not in my view. It does not even come close.

Judging by the hyperactivity of politicians from the President, to Members of Congress, to State legislators, to members of city councils, you would think that American was aflame with burning flags. That is not the case. Americans revere our flag. Every day there are millions—literally millions—of acts of reverence for our flag. School children salute our flag and pledge their allegiance in thousands of classrooms every day. Citizens raise the flag at their homes and their places of business. The flag is displayed at ceremonies of every kind by every kind of group. These are everyday acts that number in the millions every day. They number in the billions every year. Measure that against an occasional burning of the flag. How many cases of desecration are there? Ten or twenty in a year? So few that no one bothers to keep count. In fact, the Department of Justice so far has only found one person presently incarcerated under the Federal flag statute.

So I say enough hyperactivity. Enough breast-beating. Enough political one-upsmanship. Amending the Constitution is serious business, not a ploy for gaining an advantage in the next election.

There are radical wrongs crying out for an amendment to the Constitution. If we are so passionate about an amendment this year, how about an amendment to balance the Federal budget? Last year, this very committee had an opportunity to send a balanced budget amendment to the floor, but certain of the members of the majority party on this committee contrived to strangle that effort. Senate Resolution 11 had 31 cosponsors last year, from both sides of the aisle. It was reported favorably by the Constitution Subcommittee on May 25 of last year. But it never reached the floor because the committee leadership of this committee bottled it up. So let's uncork it, Mr. Chairman and fellow members, if we are so hot and so sweaty to amend the Constitution. Let's amend it in a way that would do good for this country. If we are panting to amend the Constitution, let's amend it to require a balanced budget. Budget deficits year in and year out, deficits that have run up a national debt now of $3 trillion do far more injury to our country and to our fellow citizens and their future than the occasional flag burning by a crackpot.

And there is a radical wrong even far worse than fiscal irresponsibility that cries out every day for a constitutional amendment. Desecration of the flag is wrong, but it is nothing, nothing compared with the desecration of human life that takes place in abortion clinics every day in this country. When you talk about abortion, you are not talking about an occasional act of desecration, you are talking about an every day act of desecration. You are not talking about a handful a year, you are talking about thousands every day, and 1½ million every year.

Flag desecration is clearly wrong, but killing the offspring of human beings is far worse. The offspring of human beings are human beings. They are not dogs. They are not pigs. It is self-evident that the offspring of human beings are human beings, and that each abortion kills a human being. So let us amend the Constitution to prevent the desecration of human life, except in those rare cases where the life of the mother is threatened.

Unfortunately, such an amendment is not the subject of today's hearing. So I return to the matters before us. Burning the flag is distasteful. Showing disrespect of any kind toward the flag is disgusting and highly offensive to nearly every American Citizen, including this one. And if the majority rules, the majority in society rules in this case, we shall have a new law or a new provision of the Constitution. A new law will not last, it seems to me. And while it does last, for those few years, Congress will be engaged in an endless struggle defining by statute and redefining by statute just what constitutes desecration.

May I have that bag, please?

I view this constitutes desecration, making footwear, slippers out of the American flag. I mean, there it is. It is unmistakable, stars on a field of blue, red and white stripes, that President and Mrs. Reagan are sitting in the slippers is incidental. That is also an act of disrespect, but it pales in comparison to what has been done to this flag. Making footwear out of the American flag, that seems to me to be desecration.

If we are going to get into this kind of arcane minutia, I do not know where it will all end. I think it will be an endless riddle, paper flags worn as caps or patches on trousers, it will be endless. But in any event, I think such a law will not last very long at all.

So returning to the matter of a constitutional amendment, Mr. Chairman, the framers of the Bill of Rights, in effect, withdrew from the legislature authority to legislate in a way that would limit free speech. Of course, the right of free speech is not absolute, nor was it meant to be. No one has a right to endanger public safety by means of intemperate speech. No one has a right to injure another through slander or libel. No one has the right to injure or destroy the property of another while expressing himself under the first amendment.

But apart from these restrictions, based upon the upholding of the rights of others, there are no restrictions on our right to free speech, nor should there be. Of course, some will remind me of the laws on pornography. But I hope we are not going to define political debate and political expression, or some of it, as pornography. Some might thing it is, but I hope we are not going to define it as thus for the law.

Except to ensure public safety and to protect the rights of others, speech must never be restricted, simply because the majority want it restricted. The right to free speech must always be just as broad and far reaching as the rights of others will permit. However obnoxious and offensive flag burning might be, it does not constitute the grounds for restricting the right to free speech. It does not constitute the grounds for amending the first amendment.

The Republic is in no danger from the isolated few, often demented, who burn the flag. Their tiny sparks of hatred are quickly extinguished by a vast ocean of love for our flag. Those who dishonor the flag are but specks in the huge throngs of Americans who honor and uphold our flag every day.

The Republic can be endangered, however, by political opportunism. It can be endangered by those who might be tempted to use the flag controversy for partisan purposes, and, therefore, I appeal to Republicans and Democrats alike, from the White House to the city halls across America, for the sake of our country, for the sake of the Bill of Rights, for the sake of all that the flag represents, let us not throw the gasoline of partisan politics onto this red hot controversy.

[The statement of Senator Humphrey follows:]

SENATE JUDICIARY COMMITTEE
HEARING ON MEASURES TO PROTECT THE AMERICAN FLAG
AUGUST 1, 1989

STATEMENT OF SENATOR GORDON J. HUMPHREY

MR. CHAIRMAN, IT SEEMS TO ME IT COMES DOWN TO THIS: A STATUTE WON'T WORK, BECAUSE THE COURT WILL OVERTURN IT THE FIRST TIME A CASE COMES ALONG THAT INVOLVES DESECRATION CLEARLY MEANT AS POLITICAL EXPRESSION. THAT LEAVES A CONSTITUTIONAL AMENDMENT.

THE FOUNDERS MEANT FOR THE CONSTITUTION TO BE AMENDABLE. BUT AMENDING MUST ALWAYS BE VIEWED AS A RADICAL REMEDY. THERE HAVE BEEN RADICAL WRONGS THAT DEMANDED SUCH A RADICAL REMEDY. FOR EXAMPLE, SLAVERY. FOR EXAMPLE, DENIAL OF EQUAL PROTECTION OF THE LAWS. FOR EXAMPLE, DENIAL OF THE RIGHT TO VOTE ON ACCOUNT OF RACE, COLOR, OR PREVIOUS CONDITION OF SERVITUDE. FOR EXAMPLE, DENIAL OF THE RIGHT TO VOTE ON ACCOUNT OF SEX. FOR EXAMPLE, DENIAL OF THE RIGHT TO VOTE BY REASON OF FAILURE TO PAY ANY POLL TAX OR OTHER TAX. THESE WERE RADICAL WRONGS DEMANDING A RADICAL REMEDY.

BUT DOES THE COMPARATIVELY RARE DESECRATION OF OUR FLAG MERIT THE RADICAL REMEDY OF AMENDING THE CONSTITUTION? FURTHER, DOES DESECRATION MERIT AMENDING THE FIRST AMENDMENT -- THAT PRECIOUS BEDROCK OF OUR FREEDOM? NOT IN MY VIEW. IT DOESN'T EVEN COME CLOSE.

JUDGING BY THE HYPERACTIVITY OF POLITICIANS FROM THE PRESIDENT, TO MEMBERS OF CONGRESS, TO STATE LEGISLATORS TO MEMBERS OF CITY COUNCILS, YOU WOULD THINK AMERICA WAS AFLAME WITH BURNING FLAGS. THAT IS NOT THE CASE. AMERICANS REVERE OUR FLAG. EVERY DAY, THERE ARE MILLIONS -- MILLIONS -- OF ACTS OF REVERENCE FOR OUR FLAG. SCHOOLCHILDREN SALUTE OUR FLAG AND PLEDGE THEIR ALLEGIANCE. CITIZENS RAISE THE FLAG AT THEIR HOMES AND THEIR PLACES OF BUSINESS. THE FLAG IS DISPLAYED AT CEREMONIES OF EVERY KIND. THESE ARE EVERYDAY ACTS THAT NUMBER IN THE MILLIONS EVERY DAY. THEY NUMBER IN THE BILLIONS EVERY YEAR. MEASURE THAT AGAINST AN OCCASIONAL BURNING OF THE FLAG. HOW MANY CASES OF DESECRATION ARE THERE, TEN OR TWENTY A YEAR? SO FEW, NO ONE BOTHERS TO KEEP COUNT.

SO, I SAY, ENOUGH HYPERACTIVITY. ENOUGH BREASTBEATING. ENOUGH POLITICAL ONE-UPSMANSHIP. AMENDING THE CONSTITUTION IS SERIOUS BUSINESS, NOT A PLOY FOR GAINING AN ADVANTAGE IN THE NEXT ELECTION.

THERE ARE RADICAL WRONGS CRYING OUT FOR AN AMENDMENT TO THE CONSTITUTION. IF WE ARE SO PASSIONATE ABOUT AN AMENDMENT, HOW ABOUT AN AMENDMENT TO BALANCE THE FEDERAL

BUDGET? LAST YEAR, THIS VERY COMMITTEE HAD AN OPPORTUNITY TO SEND A BALANCED BUDGET AMENDMENT TO THE FLOOR, BUT CERTAIN OF THE MEMBERS OF THE MAJORITY PARTY ON THIS COMMITTEE CONTRIVED TO STRANGLE IT. SENATE RESOLUTION 11 HAD THIRTY-ONE COSPONSORS, FROM BOTH SIDES OF THE AISLE. IT WAS REPORTED FAVORABLY BY THE CONSTITUTION SUBCOMMITTEE ON MAY 25 OF LAST YEAR. BUT IT NEVER REACHED THE FLOOR, BECAUSE THE COMMITTEE LEADERSHIP BOTTLED IT UP. IF WE'RE PANTING TO AMEND THE CONSTITUTION THIS YEAR, LET'S AMEND IT TO REQUIRE A BALANCED BUDGET. BUDGET DEFICITS YEAR IN AND YEAR OUT, BUDGET DEFICITS THAT HAVE RUN OUR NATIONAL DEBT UP TO $3 TRILLION DOLLARS DO FAR MORE INJURY TO OUR COUNTRY AND TO OUR FELLOW CITIZENS THAT AN OCCASIONAL FLAG BURNING BY A CRACKPOT.

AND THERE IS A RADICAL WRONG FAR WORSE THAN FISCAL IRRESPONSIBILITY THAT CRIES OUT EVERY DAY FOR A CONSTITUTIONAL AMENDMENT. DESECRATION OF THE FLAG IS WRONG, BUT IT IS NOTHING COMPARED WITH THE DESECRATION OF HUMAN LIFE THAT TAKES PLACE IN ABORTION CLINICS EVERY DAY IN THIS COUNTRY. WHEN YOU TALK ABOUT ABORTION, YOU'RE NOT TALKING ABOUT AN OCCASIONAL ACT OF DESECRATION, YOU'RE TALKING ABOUT AN EVERYDAY DESECRATION. YOU'RE NOT TALKING ABOUT A HANDFUL A YEAR, YOUR TALKING ABOUT THOUSANDS EVERY DAY OF THE YEAR -- A MILLION AND A HALF EVERY YEAR.

FLAG DESECRATION IS WRONG, BUT KILLING THE OFFSPRING OF HUMAN BEINGS IS FAR MORE WRONG. THE OFFSPRING OF HUMAN BEINGS ARE HUMAN BEINGS. THEY ARE NOT DOGS OR PIGS. IT'S SELF-EVIDENT THAT THE OFFSPRING OF HUMAN BEINGS ARE HUMAN BEINGS, AND EACH AND EVERY ABORTION KILLS A HUMAN BEING. SO LET'S AMEND THE CONSTITUTION TO PREVENT THE DESECRATION OF HUMAN LIFE, EXCEPT IN THOSE RARE CASES WHERE THE LIFE OF THE MOTHER IS THREATENED.

UNFORTUNATELY, SUCH AN AMENDMENT IS NOT THE SUBJECT OF TODAY'S HEARING. SO, I RETURN TO THE MATTERS BEFORE US. BURNING THE FLAG IS DISTASTEFUL. SHOWING DISRESPECT OF ANY KIND TOWARD THE FLAG IS DISGUSTING AND HIGHLY OFFENSIVE TO NEARLY EVERY AMERICAN CITIZEN, INCLUDING THIS ONE. AND IF THE MAJORITY RULES IN THIS CASE, WE SHALL HAVE A NEW LAW OR A NEW PROVISION OF THE CONSTITUTION.

A NEW LAW WON'T LAST. IT WILL LAST ONLY AS LONG AS IT TAKES FOR A CASE TO REACH THE SUPREME COURT INVOLVING POLITICAL EXPRESSION. THEN THAT LAW WILL BE OVERTURNED.

IT'S INTERESTING TO NOTE WHY THIS IS THE CASE. IT IS SO, BECAUSE THE FIRST AMENDMENT FORBIDS THE ENACTMENT OF LAW WHICH ABRIDGES THE FREEDOM OF SPEECH. THE FRAMERS OF THE BILL OF RIGHTS IN EFFECT WITHDREW FROM THE LEGISLATURES AUTHORITY TO LEGISLATE IN A WAY THAT WOULD LIMIT FREE SPEECH.

OF COURSE, THE RIGHT OF FREE SPEECH IS NOT ABSOLUTE, NOR WAS IT MEANT TO BE. NO ONE HAS A RIGHT TO ENDANGER PUBLIC

SAFETY BY MEANS OF INTEMPERATE SPEECH. NO ONE HAS A RIGHT TO INJURE ANOTHER THROUGH SLANDER OR LIBEL. NO ONE HAS THE RIGHT TO INJURE OR DESTROY THE PROPERTY OF ANOTHER, WHILE EXPRESSING HIMSELF UNDER THE FIRST AMENDMENT.

BUT APART FROM THESE RESTRICTIONS, BASED ON UPHOLDING THE RIGHTS OF OTHERS, THERE ARE NO RESTRICTIONS ON OUR RIGHT TO FREE SPEECH, NOR SHOULD THERE BE. EXCEPT TO ENSURE PUBLIC SAFETY AND TO PROTECT THE RIGHTS OF OTHERS, SPEECH MUST NEVER BE RESTRICTED SIMPLY BECAUSE THE MAJORITY WANT IT RESTRICTED. THE RIGHT TO FREE SPEECH MUST ALWAYS BE JUST AS BROAD AND FAR-REACHING AS THE RIGHTS OF OTHERS WILL PERMIT. HOWEVER OBNOXIOUS AND OFFENSIVE FLAG-BURNING MIGHT BE, IT DOES NOT CONSTITUTE GROUNDS FOR RESTRICTING THE RIGHT TO FREE SPEECH. IT DOES NOT CONSTITUTE GROUNDS FOR AMENDING THE FIRST AMENDMENT.

THE REPUBLIC IS IN NO DANGER FROM THE ISOLATED FEW, OFTEN DEMENTED, PERSONS WHO BURN THE FLAG. THEIR TINY SPARKS OF HATRED ARE QUICKLY EXTINGUISHED BY A VAST OCEAN OF LOVE FOR OUR FLAG. THOSE FEW WHO DISHONOR THE FLAG ARE BUT SPECKS IN THE HUGE THRONGS OF AMERICANS WHO HONOR AND UPHOLD OUR FLAG. THE REPUBLIC CAN BE ENDANGERED, HOWEVER, BY POLITICAL OPPORTUNISM. IT CAN BE ENDANGERED BY THOSE WHO MIGHT BE TEMPTED TO USE THE FLAG CONTROVERSY FOR PARTISAN PURPOSES. AND, THEREFORE, I APPEAL TO REPUBLICANS AND DEMOCRATS ALIKE: FOR THE SAKE OF OUR COUNTRY, FOR THE SAKE OF THE BILL OF RIGHTS, FOR THE SAKE OF ALL THE FLAG REPRESENTS, LET US NOT THROW THE GASOLINE OF PARTISAN POLITICS ONTO THIS RED HOT CONTROVERSY.

The **Chairman**. The Senator from Wisconsin, I believe, is next, and then we have two other Senators.

OPENING STATEMENT OF SENATOR KOHL

Senator **Kohl**. Thank you, Mr. Chairman.

I am pleased that you have assembled such a distinguished panel of witnesses for today's hearing. I look forward to listening to a diversity of views on this important issue. I am especially glad that we have an opportunity to hear from Senator Mathias, a man who has always displayed a masterful knowledge of the Constitution. To Senator Mathias, Senator Thurmond, and all of our witnesses, I thank each of you for your participation.

All of us agree that flag burning is reprehensible. We know that flag burners are irresponsible, infantile, and irrelevant to the real political discourse of our Nation. The question is, how should we respond to this offense? As a citizen, I will continue to denounce those who defile the symbol of our collective aspirations. But as a lawmaker, I am reluctant to tamper with the document that has served us so well for 200 years. As long as we have a legislative solution at hand, I cannot endorse an exception to the Bill of Rights.

S. 1338 represents a measured response to the problem. Persons who mutilate our flag could be fined up to $1,000 and imprisoned for a year. By enacting this measure, I believe that we would fulfill our obligation as guardians of the flag and as defenders of the Constitution, and we can do it now, quickly, effectively, and without the risk of weakening the constitutional principles for which the flag stands.

Finally, Mr. Chairman, I want to say a word about patriotism. My love for this Nation is real, and it runs deep. I know my feelings are shared by all of my colleagues, Republic and Democrat alike. All are patriots, no matter where each of us stands on flag desecration. For this reason, I hope that our debate, like our flag itself, rises above partisan politics. Thank you, Mr. Chairman.

[The statement of Senator Kohl follows:]

Senate Judiciary Committee August 1, 1989

OPENING STATEMENT OF SENATOR HERB KOHL

MR. CHAIRMAN, I'M PLEASED THAT YOU'VE ASSEMBLED SUCH A DISTINGUISHED PANEL OF WITNESSES FOR TODAY'S HEARING. I LOOK FORWARD TO LISTENING TO A DIVERSITY OF VIEWS ON THIS IMPORTANT ISSUE. I'M ESPECIALLY GLAD THAT WE HAVE AN OPPORTUNITY TO HEAR FROM SENATOR MATHIAS--A MAN WHO HAS ALWAYS DISPLAYED A MASTERFUL KNOWLEDGE OF THE CONSTITUTION. TO SENATOR MATHIAS, SENATOR THURMOND--AND ALL OF OUR WITNESSES--I WANT TO THANK YOU FOR PARTICIPATING.

ALL OF US AGREE THAT FLAG BURNING IS REPREHENSIBLE. WE KNOW THAT FLAG BURNERS ARE IRRESPONSIBLE, INFANTILE, AND IRRELEVANT TO THE REAL POLITICAL DISCOURSE OF OUR NATION. THE QUESTION IS, HOW SHOULD WE RESPOND TO THIS OFFENSE? AS A CITIZEN, I WILL CONTINUE TO DENOUNCE THOSE WHO DEFILE THE SYMBOL OF OUR COLLECTIVE ASPIRATIONS. BUT AS A LAWMAKER, I AM RELUCTANT TO TAMPER WITH THE DOCUMENT THAT HAS SERVED US SO WELL FOR 200 YEARS. AS LONG AS WE HAVE A LEGISLATIVE SOLUTION AT HAND, I CANNOT ENDORSE AN EXCEPTION TO THE BILL OF RIGHTS.

S. 1338 REPRESENTS A MEASURED RESPONSE TO THE PROBLEM. PERSONS WHO MUTILATE OUR FLAG COULD BE FINED UP TO $1,000 DOLLARS AND IMPRISONED FOR A YEAR. BY ENACTING THIS MEASURE, I BELIEVE THAT WE WOULD FULFILL OUR OBLIGATIONS AS GUARDIANS OF THE FLAG AND DEFENDERS OF THE CONSTITUTION. AND WE CAN DO IT

NOW--QUICKLY, EFFECTIVELY, AND WITHOUT THE RISK OF WEAKENING THE CONSTITUTIONAL PRINCIPLES FOR WHICH THE FLAG STANDS.

FINALLY, MR. CHAIRMAN, I WANT TO SAY A WORD ABOUT PATRIOTISM. MY LOVE FOR THIS NATION IS REAL, AND IT RUNS DEEP. I KNOW MY FEELINGS ARE SHARED BY ALL OF MY COLLEAGUES, REPUBLICAN AND DEMOCRATIC. ALL ARE PATRIOTS, NO MATTER WHERE EACH OF US STANDS ON FLAG DESECRATION. FOR THIS REASON, I HOPE OUR DEBATE, LIKE THE FLAG ITSELF, RISES ABOVE PARTISAN POLITICS.

THANK YOU.

The CHAIRMAN. Thank you very much.

The Senator from Arizona, Senator DeConcini.

OPENING STATEMENT OF SENATOR DeCONCINI

Senator DECONCINI. Mr. Chairman, thank you. My compliments to you for your swiftness and very professional manner in scheduling today's hearing. By considering both the constitutional amendment and your legislation in hearings the full Senate will be able to address other equally important issues. In addition, I believe, as has been indicated by all members, that we will be able to avoid partisan politics on this important issue. I complement you, Mr. Chairman, for that and for holding these hearings.

The CHAIRMAN. Thank you.

Senator DECONCINI. Mr. Chairman, we are here to learn and to find out what we can do with a very distasteful and I think reprehensible decision by the U.S. Supreme Court.

To me, the Constitution is important, the most important document that we live by. It is not something to alter on whim or a spur of a passion in this country, but it is also important to know that we have amended the Constitution, and we have attempted to do so on a number of occasions with important issues that at the time, and even today, could certainly be termed symbolic.

I look at this particular problem facing us today in the Judiciary Committee as a very important subject matter, the flag of the United States. Now, some will say, well, if you try to put that in the Constitution, are you not demeaning the Constitution? I do not know that I would agree with that. It seems to me that what we want to do is make the Constitution more representative of the values of this country and the foundation this country is built upon.

It appears to me that the flag of the United States is something that is more than just a symbol, that it represents and embodies a great deal of spirit and sacrifice that people have died for and suffered for and worked hard for. So I think we need to look at this in a serious vein, which I am sure we will.

Relating to the Senator from Delaware's legislative proposal, I am very interested in that and I look forward to the discussions forthcoming. I do not know if we can do what the Senator wants to do and have it upheld constitutionally. I know the Senator from Delaware is convinced that he can, and I have read a couple of arguments on both sides of the debate. So I look forward to the testimony to see how that plays out in this process. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

The Senator from Alabama, Senator Heflin.

OPENING STATEMENT OF SENATOR HEFLIN

Senator HEFLIN. Mr. Chairman, the Judiciary Committee commences hearings today on how to protect the flag. And there are two avenues that are being pursued, those being the legislative route and the constitutional road. We want to protect the flag and at the same time not do any damage to the Constitution unless it is necessary. As I have said before on the Senate floor, I feel that the ruling incorrectly places flag burning under the protection of the Constitution. Therefore, I welcome these hearings because I feel it is our responsibility to start the process to reverse the *Johnson* decision.

Few people would disagree with the argument that the American flag stands as one of the most powerful and meaningful symbols of freedom ever created. In the dissent in *Johnson*, Chief Justice Rehnquist stated in his opening paragraph:

> For more than 200 years, the American flag has occupied a unique position as a symbol of our Nation, a uniqueness that justifies a government prohibition against flag burning in the way * * * *Johnson* did here.

I agree with Chief Justice Rehnquist that this uniqueness justifies a governmental protection against flag burning. And I hope that we can pursue the various alternatives and come up with the right solution. However, I am not convinced that legislative changes can correct this error of the Supreme Court. So I continue to push for a constitutional amendment. But it is my hope that at the conclusion of these hearings, we will possess the requisite insight, concerning both the statutory and constitutional options.

Nevertheless, at the present time, one thing remains clear—we must somehow act to ensure that the American flag remains protected and continues to hold the high place that all of us feel that it should, both in our hearts and in our history.

The CHAIRMAN. Thank you very much.

[Text of proposed measures.]

101st CONGRESS
1st Session

S. 1338

To amend title 18, United States Code, to protect the physical integrity of the flag of the United States.

IN THE SENATE OF THE UNITED STATES

JULY 18 (legislative day, JANUARY 3), 1989

Mr. BIDEN (for himself, Mr. ROTH, Mr. COHEN, Mr. MITCHELL, Mr. SIMON, Mr. DECONCINI, Mr. BURDICK, Mr. BOND, Mr. HEFLIN, Mr. HATCH, Mr. REID, Mr. GORE, Mr. BRYAN, Mr. KOHL, Mr. PELL, Mr. LIEBERMAN, Mr. CRANSTON, Mr. HOLLINGS, Mr. GRAHAM, Mr. SANFORD, Mr. LEVIN, Mr. GLENN, Mr. GRASSLEY, Mr. DIXON, Mr. FORD, Mr. CONRAD, Mr. DODD, Mr. NUNN, Mr. ADAMS, and Ms. MIKULSKI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 18, United States Code, to protect the physical integrity of the flag of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Biden-Roth-Cohen Flag Protection Act of 1989".

SEC. 2. AMENDMENT TO TITLE 18.

Subsection (a) of section 700 of title 18, United States Code, is amended to read as follows:

"(a) Whoever knowingly mutilates, defaces, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined not more than $1,000 or imprisoned for not more than one year, or both.".

II

101st CONGRESS
1st Session

H. R. 2978

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 13(legislative day, SEPTEMBER 6), 1989

Received; read twice and referred to the Committee on the Judiciary

AN ACT

To amend section 700 of title 18, United States Code, to protect the physical integrity of the flag.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Flag Protection Act of 1989".

SEC. 2. CRIMINAL PENALTIES WITH RESPECT TO THE PHYSICAL INTEGRITY OF THE UNITED STATES FLAG.

(a) IN GENERAL.—Subsection (a) of section 700 of title 18, United States Code, is amended to read as follows:

"(a)(1) Whoever knowingly mutilates, defaces, burns, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

"(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.".

(b) Definition.—Section 700(b) of title 18, United States Code, is amended to read as follows:

"(b) As used in this section, the term 'flag of the United States' means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.".

SEC. 3. EXPEDITED REVIEW OF CONSTITUTIONAL ISSUES.

Section 700 of title 18, United States Code, is amended by adding at the end the following:

"(d)(1) If the question of the constitutionality of this section, under the first article of amendment to the Constitution of the United States, is properly presented in any case before a United States district court, that court shall, if the Supreme Court of the United States has not previously ruled on that question, immediately certify that question to the Supreme Court.

"(2) The Supreme Court shall, if it has not previously ruled on that question, accept jurisdiction over the certified question and advance on the docket and expedite to the greatest extent possible the disposition of that question. The Supreme Court may, with respect to such question, give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

"(3) The Clerk of the Supreme Court shall promptly notify the Clerk of the House of Representatives and the Secretary of the Senate of the receipt of such certification, and each House of Congress shall have the right to intervene in the case for the purpose of defending the constitutionality of this section.".

Passed the House of Representatives September 12, 1989.

Attest: DONNALD K. ANDERSON,

Clerk.

II

101st CONGRESS
1st Session

S. J. RES. 180

Proposing an amendment to the Constitution of the United States authorizing the Congress and the States to prohibit the physical desecration of the flag of the United States.

IN THE SENATE OF THE UNITED STATES

July 18 (legislative day, January 3), 1989

Mr. Dole (for himself, Mr. Dixon, Mr. Thurmond, Mr. Heflin, Mr. Wilson, Mr. Grassley, Mr. Hatch, Mr. Armstrong, Mr. Bentsen, Mr. Bond, Mr. Boschwitz, Mr. Breaux, Mr. Bryan, Mr. Burdick, Mr. Burns, Mr. Byrd, Mr. Coats, Mr. Cochran, Mr. Cohen, Mr. D'Amato, Mr. Danforth, Mr. DeConcini, Mr. Domenici, Mr. Exon, Mr. Ford, Mr. Garn, Mr. Gorton, Mr. Gramm, Mr. Heinz, Mr. Helms, Mr. Hollings, Mrs. Kassebaum, Mr. Kasten, Mr. Lott, Mr. Mack, Mr. McCain, Mr. McClure, Mr. McConnell, Mr. Murkowski, Mr. Nickles, Mr. Nunn, Mr. Pressler, Mr. Reid, Mr. Robb, Mr. Rockefeller, Mr. Roth, Mr. Rudman, Mr. Shelby, Mr. Simpson, Mr. Stevens, Mr. Symms, Mr. Wallop, and Mr. Warner) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States authorizing the Congress and the States to prohibit the physical desecration of the flag of the United States.

Whereas the Flag of the United States of America is a national symbol of such stature that it must be kept inviolate;

Whereas the physical desecration of the Flag should not be considered constitutionally protected speech; and

Whereas physical desecration may include, but is not limited to, such acts as burning, mutilating, defacing, defiling or trampling on the Flag, or displaying the Flag in a contemptuous manner: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

"ARTICLE —

"The Congress and the States shall have power to prohibit the physical desecration of the Flag of the United States.".

The **Chairman**. Now we will call our next witness. And I say to those witnesses who are waiting, practically speaking, I suspect this will be the only witness we will get to prior to lunch. And I know you would all want to hear Senator Mathias, but in the event you have other things you must do, it would be appropriate for you to hold until—it probably will not be on until 2 o'clock.

Our second witness is a distinguished former member of this committee, a man of great aplomb and knowledge, and one who is loved and respected here in the Senate, Senator Charles McC. Mathias, Jr.

Senator, it is really good to have you back. I know you are now with Jones, Day, Reavis & Pogue, but we still consider you part of this committee and part of the Senate. Your career here was very distinguished, and we are impressed that you continue to give us your time.

STATEMENT OF FORMER SENATOR CHARLES McC. MATHIAS, JR., JONES, DAY, REAVIS & POGUE

Senator **Mathias**. Thank you very much Mr. Chairman and members of the committee. I appreciate the warm welcome expressed here today and am happy to be here in the hope that I can contribute something to what is obviously a very difficult decision. It is a difficult decision because it is almost impossible to be objective about the American flag. Our associations with the flag are without number, and I think they all involve sentiment and emotion, memory, and loyalty.

And if I can be personal for just a moment. When the flag is mentioned, for example, there frequently flashes before my inward eye the sight of the U.S.S. *Appalachian* steaming up the South China Sea on the way to the liberation of the Philippines. She was leading the first American fleet in those waters since the fall of Corregidor. She was under almost constant attack by Kamikazes. There were great rolling seas tossing the ship. But the thing that is fixed in my mind's eye, the thing I see most vividly is the "battle ensign," that huge outsized American flag snapping in the wind which we flew when we were engaged in hostilities. And those are the memories that stir the blood and that seal the bond, seal the bond with the flag in a way that is unique and yet at the same time it is universal, since every American has some sort of personal experience to confirm an attachment to the flag.

But when that moment of drama has passed and reflections begin, we know that the flag is dear to us because of, "the Republic for which it stands. We may be a nation of idealists," but we are not a nation of idolaters. A century and a quarter after Lincoln called the Union "the last best hope of earth," it is more than ever apparent that he was right.

At the very heart of the Republic is the Bill of Rights. When the Constitutional Convention adjourned in 1787, it was generally agreed that the Constitution needed one further protection for the people before it could be called complete. As a condition to ratification, there was a commitment to incorporate a Bill of Rights. This extraordinary provision went beyond precedent in providing a shield, not only to all the people against the tyranny of government, but also to the minority against the bullying of the majority. Thomas Jefferson observed that "error of opinion may be tolerated where reason is left free to combat it," and that, Mr. Chairman, is the essence of the first amendment. It is that shield of the Bill of Rights that we consider today. Shall we burnish it and maintain it for our children as it was given to us, or shall we in some way diminish its size?

This question arises at an appropriate moment. On September 25, just next month, we shall observe the bicentennial of the adoption of the Bill of Rights by the First Congress. The 101st Congress is the trustee of both the Constitution and the legacy of 200 years of unparalleled individual liberty that has made Americans the freest people in the world and America the ideal for millions everywhere. It is a trust that is imposed on all who take the oath to uphold and defend the Constitution.

Mr. Chairman, I scorn those whose intellectual ability and power of communication are so limited that they resort to desecration of the flag to express frustration and anger. How flag burners must envy the capacity of those who have the power to speak or write to advocate change that may be more radical than anything they contemplated, and who do so under the undoubted protection of the first amendment.

Why then should flag burners be so irritating? And I think we all admit that they are irritating. But why not recall Longfellow's "Ship of State" sailing majestically through history with its freight of the, "hopes of future years." The floor of the sea is covered with slugs and snails and slimy creatures whose submarine activities do not cause the great ship to deviate a degree from its course. It seems to me that we should treat this subject with similar indifference. Every politician in the Congress should recognize that to be ignored is the ultimate punishment that society can inflict. Thank you, Mr. Chairman.

[The statement of Senator Mathias follows:]

Statement by
Charles McC. Mathias
Committee on the Judiciary
United States Senate
August 1, 1989

It is almost impossible to be objective about the American flag. Our associations with the flag are without number and all involve sentiment and emotion, memory and loyalty.

When the flag is mentioned, for example, there frequently flashes before my inward eye the sight of the United States Ship Appalachian steaming up the South China Sea on the way to the liberation of the Philippines. It was leading the first American fleet in those waters since the fall of Corregidor, it was under Kamikaze attack and it was tossed by huge rolling seas. But the thing I see the most vividly is the "battle ensign" snapping in the wind, the special, outsize American flag that we flew when we were engaged in hostilities. Such memories stir the blood and seal the bond with the flag in a way that is unique, but at the same time universal, since every American has some sort of personal experience to confirm an attachment to the flag.

When the moment of drama has passed and reflection begins, we know that the flag is dear to us because of "the Republic for which it stands." We may be a nation of idealists, but we are not a nation of idolators. A century and a quarter after Lincoln called the Union "the last, best hope of earth", it is more than ever apparent that he was right.

At the very heart of the Republic is the Bill of Rights. When the Constitutional Convention adjourned in 1787 it was generally agreed that the Constitution needed one further protection for the people before it could be called complete. As a condition to ratification there was a commitment to incorporate a Bill of Rights. This extraordinary provision went beyond precedent in providing a shield not only to all the people against the tyranny of government, but also to the minority against the bullying of the majority. Thomas Jefferson observed that "error of opinion may be tolerated where reason is left free to combat it," and that is the essence of the First Amendment. It is that shield of the Bill of Rights that we consider today. Shall we burnish it and maintain it for our children as it was given us, or shall we in some way diminish its size?

This question arises at an appropriate moment. On the 25th day of September, next month, we shall observe the bicentennial of the adoption of the Bill of Rights by the First Congress. The Hundred and First Congress is the trustee of both the Constitution and the legacy of two hundred years of unparalleled individual liberty that has made Americans the freest people in the world and America the ideal for millions everywhere. It is a trust imposed on all who take the oath to uphold and defend the Constitution.

I scorn those whose intellectual ability and power of communication are so limited that they resort to desecration of the flag to express frustration and anger. How flag-burners must envy the capacity of those who have the power to speak or write to advocate change that may be more radical than anything they contemplated, and who do so under the undoubted protection of the First Amendment.

Why then should flag burners be so irritating? Why not recall Longfellow's Ship of State sailing majestically through history with its freight of the "hopes of future years." The floor of the sea is covered with slugs and snails and slimy creatures whose submarine activities do not cause the great ship to deviate a degree from its course. It seems to me that we should treat this subject with similar indifference. Every politician in the Congress should recognize that to be ignored is the ultimate punishment society can inflict.

The **Chairman**. It is obviously a punishment that will never be inflicted on you, Senator.

Let me ask you just a few questions before I yield to my colleague. Please elaborate a little more on the process of amendment—as we know, the Founders contemplated the notion that the Congress, that the people, that the States may wish to make changes and/or additions to and in the Constitution. How would an amendment, in and of itself, do such violence to the first amendment?

Senator **Mathias**. Well, I think, Mr. Chairman, of course amendment is a proper process, article V provides for it, and we have both engaged in the amending process, and done so, I think, successfully and beneficially. But there can be good amendments and bad amendments. And it seems to me an amendment that restricts the freedom of expression of Americans would be a bad amendment.

It would diminish the scope of the first amendment. It would diminish the freedom of Americans, and I think you always have to consider the unintended consequences of our actions. No one can foresee precisely how an amendment to restrict the freedom of speech, freedom of expression of Americans would operate.

There is a law of unintended consequences that usually operates to do other and different and more things than we originally intended when we take an action, and I think that is one of the concerns I have with respect to a constitutional amendment in this field.

The **Chairman**. The constitutional amendment proposed by the President, and I believe the one that Senators Thurmond and Hatch and others are the cosponsors of, Senator Dole, I guess, is the primary cosponsor, as I understand it, that constitutional amendment does not specifically state how and in what manner each of the various States would or could protect the flag, that is, it only says that they can, the States can, and the Federal Government can pass a law making, "desecration of the flag," unlawful.

Is that what concerns you, that one State could say that you cannot, that it constitutes desecration to fly the flag at the Republican State convention if it was controlled by the Democratic legislature or it is desecration of the flag in the State of Minnesota to fly it at anything other than a political convention? I mean, are they the kinds of concerns?

Senator **Mathias**. Well, I think that is one of the many concerns I would have, that you could end up with a patchwork of law which as you cross State lines, you would have different criminal liabilities for particular acts with relation to the flag.

It is conceivable under some of the provisions that have been suggested that the Postmaster General of the United States would be subjected to criminal liability because of the daily defacement of millions of flags when they cancel the stamps. The imagination, as the Senator from New Hampshire has pointed out, is really defeated by the many cases that would have to be considered as exemptions or somehow fenced out from the operation of the statute, and it seems to me that the Senator from New Hampshire has very forcefully expressed the objections to this proposal.

The CHAIRMAN. I will refrain from further questions for two reasons, one, there is a vote on, and two, in light of our unanimous consent agreement earlier, both the Senator from Vermont and the Senator from Pennsylvania have arrived. I know the Senator from Maryland, or former Senator from Maryland has a requirement to be somewhere else at 1 o'clock, if I am not mistaken.

Why do we not, those of us who are able, go vote now, and I will yield the floor because we go from Democrat to Republican to the Senator from Pennsylvania, and let him begin, and then we will move to the Senator from Vermont, and then we will see where we go from there.

Senator KENNEDY. Without violating that process, Mr. Chairman, I just wanted to extend a very warm word of welcome to our former colleague, not only of the Senate, but of this committee. Hearing his clear views stated on this matter is a clear demonstration why he is missed in this body and on this committee. We are very glad to have you.

Senator MATHIAS. Thank you, Senator.

The CHAIRMAN. The Senator from Pennsylvania.

OPENING STATEMENT OF SENATOR SPECTER

Senator SPECTER. Thank you very much, Mr. Chairman.

I want to thank the chair and the committee for reserving the time. Senator Leahy and I are involved in the Judge Hastings impeachment proceedings, as has been stated, so I appreciate this opportunity to make an opening statement, and Mr. Chairman, I commend you for these hearings and for your speed in thinking about a statutory route as an alternative to a constitutional amendment in response to the Supreme Court decision in *Texas* v. *Johnson*, and I join Senator Kennedy in welcoming our distinguished colleague, Senator Mathias, to this hearing. We all miss Senator Mathias, but perhaps nobody misses him as much as I do.

Mr. Chairman, my thought is that these hearings have great utility for exploring a variety of ways to deal with the issue of flag desecration to reflect a very deep seated sense of the American public in an adverse reaction to the Supreme Court decision without having a constitutional amendment if the issue can be resolved short of a constitutional amendment.

During the course of these hearings, to the extent possible, my interest is in exploring the standard which are used by the Supreme Court of the United States when having a matter of interpretation where the Supreme Court customarily deals with a statutory interpretation before reaching a constitutional interpretation and to raise the issue as to whether that analogy would not be appropriate for a course of conduct by the Congress.

On a reading of *Texas* v. *Johnson*, and the other cases, it is certainly worth exploring whether we can have a statute which will pass constitutional muster, which deals with the act of desecration, which does not deal with the issues of expression, which were the basis for the Supreme Court's decision saying that the statute in *Texas* v. *Johnson* was unconstitutional, and perhaps for finding other grounds for the establishment of a statute which would pass constitutional muster, for example, where the act of flag mutilation might have the effect of offending or perhaps causing injury to people, perhaps pain and suffering in a variety of contexts.

The Supreme Court in *Texas* v. *Johnson* said that the conduct was offensive, but since the real thrust was as expression, that it fell within the constitutional protection. Perhaps it may be possible to structure a statute which would deal with the act of desecration, which would deal with being offensive, perhaps being injurious, perhaps an element of pain and suffering which would come within the gambit of limiting freedom of speech because we know, for example, a Pennsylvania statute prohibits an intent to harass, to say things which have an intent to harass causing injury to the recipient.

But that, Mr. President, Mr. Chairman, is only illustrative of a few of the ideas which we might explore. And I would expand upon this further, except that we now have five bells up, and we are all going to have to go to vote momentarily.

The other thought on my mind, Mr. Chairman, is that if, as and when the Supreme Court of the United States revisits the issue in a statutory context, that there may be more of an inclination on the part of the Court to uphold a statute as revised if it is even colorably distinguishable from the *Texas* v. *Johnson*. And I say this in the light of Justice Scalia's opinion recently on the homicide issue, murder issue involving juveniles looking for a national consensus, and there are differences between the eighth amendment prohibition against cruel and unusual punishment and this constitutional issue. But if you are looking for a national consensus, I think there has been a very forceful statement of national consensus and reaction to the flag case, and perhaps it may be worth exploring some of the other cases where the Supreme Court of the United States has responded to public reaction in the 1930's in shift of decision by Justice Owen Roberts in the 1950's on shifts of decision on congressional investigations the classical line about the Supreme Court following the election return.

So it is my view, Mr. Chairman, that these are very important hearings. We ought to explore the wide variety of alternatives which are available, short of a constitutional amendment, and I look forward to raising those issues during the course of the questioning.

The CHAIRMAN. Thank you. I apologize again to the witnesses. All are experienced. They have been here before, either as administration officials or witnesses before this committee or others and/or as our colleagues, and they know the schedule, the way this place works.

There is a vote now, and it will be followed by another vote, which means it will be at least 15 minutes before we could reconvene.

Let me ask the Senator from Maryland if he could—there is no way, obviously, we are going to get to question you and allow you to keep your 1 o'clock appointment as we had committed to you yesterday we would. Is there any possibility of the Senator being able to come back later in the day?

Senator MATHIAS. I think, Mr. Chairman, I could come back around 3 o'clock, if that is convenient for you?

The **Chairman**. If you are willing, we would appreciate it. If you would give us a call prior to that so you knew, so we did not bring you back and then keep you waiting. But we would bring you back for purposes of questioning, if you are willing, between witnesses. I will not take a witness off who is on. But if you could call to see if we could synchronize it.

Senator **Mathias**. I would be happy to try to work that out, and I will communicate with the staff in the early afternoon and see what the committee's convenience is.

The **Chairman**. We appreciate that very much.

We will reconvene at 2 o'clock, and we will reconvene with a very distinguished Assistant Attorney General for the Office of Legal Counsel, the Justice Department, Mr. William P. Barr, and our next witness after that will be Laurence H. Tribe, and then we will move to a panel made up of two distinguished witnesses, Charles J. Cooper, formerly of the last administration, and Judge Robert H. Bork, now of the American Enterprise Institute, and then we will go to Geoffrey Stone and then to one of the most distinguished solicitor generals in our history, Erwin N. Griswold will then testify, and we will attempt, if the Senator is able, to put the Senator between whatever the logical spot is of that witness list.

Senator **Mathias**. At your convenience, Mr. Chairman.

The **Chairman**. Thank you very much.

We will recess until 2 o'clock.

[Whereupon, at 12:20 p.m., the committee adjourned, to reconvene again at 2 p.m. this same day.]

AFTERNOON SESSION

The **Chairman**. The hearing will come to order.

As I indicated, our next witness will be William P. Barr, but we have the Senator from Vermont whose been necessarily tied up in the Hastings impeachment proceeding, who would like to make a statement and/or, if he has time, question Mr. Barr after his testimony.

OPENING STATEMENT OF SENATOR LEAHY

Senator **Leahy**. Mr. Chairman, I appreciate the courtesy in letting me come in out of order. I can assure the distinguished chairman given my druthers of spending a few days here on these hearings or the weeks that we have been spending in the Hastings matter, I would want to be standing here cheek to jowl with the distinguished chairman.

It's interesting, Mr. Chairman, that immediately after the Supreme Court's decision in *Texas* v. *Johnson* there are a lot of calls to overturn the Court's decision, and every time a new public opinion pole would come out saying how popular it would be to amend the Constitution, even more Senators would feel driven, the spirit would move them to speak on the floor about how important it is.

I mention that only as the connection being, of course, coincidental and not causal between the public opinion poles and speeches, but I think perhaps the passion has cooled a bit as people seem to realize the gravity of amending the Constitution.

I come from a very conservative and very careful and I might say very Republican State, Vermont, and that certainly has been the attitude that I have sensed as I go home every week and go around the State.

The people are saying, wait a minute; why are we about to amend the Constitution, and I would hope that perhaps the sparse turnout here today may reflect a shift in public intensity about this issue. Two days after the Supreme Court decision we probably would have packed this room, but now people have had a chance to think about this and start deciding what is more important, having this whole country of 250 million Americans turn its back on 200 years of constitutional history and amend the Bill of Rights, and why? Because of the act of a publicity seeking miscreant in Texas. Or do we stand tall and say that that same publicity seeking miscreant does not run the Constitution or the greatest democracy on earth.

I am, though, sorry to see that Attorney General Thornburgh is not here to testify. The President has made it clear that this proposed amendment is a priority with the administration. The President has, as one of his main priorities this year, to amend the Bill of Rights and the Constitution.

Well, then, if that's the case, I would hope, of course, that the Attorney General as the chief law enforcement officer and chief legal counsel for the President would be able to find time on his busy schedule to drop by and give us his views on this key priority of the administration.

But today, Mr. Chairman, our committee will address the issue of flag desecration. We are going to listen to scholars and practitioners. There will be careful and deliberate consideration of all the options both by Senators for and those against a constitutional amendment.

Many of my colleagues, and I certainly admit many of my colleagues whose opinions I hold highly and in fact many of the witnesses also whose opinions and legal scholarship I hold highly, will argue that we need an amendment to the Constitution to prohibit the desecration of the American flag.

I should state as one Vermonter, as one Senator, that I firmly and unequivocally reject this option. Now, there's no question we all realize burning the American flag is a despicable act. The Congressional Medal of Honor winner who serves in the U.S. Senate I think said that in his State you probably need laws to protect somebody who might burn the flag rather than the flag because of the reaction of people in his State.

I think there would be the same reaction from the people in Delaware and Vermont or anywhere else. You don't have to be Republican, Democrat, or independent to find it totally abhorrent to desecrate their national symbol.

But I think that the proposal of the chairman is a far more sound and reasoned approach than any proposed amendment to the Constitution, and I think that if we are going to take action as a committee where we amend a statute rather than the Constitution, we are far better to take the former than the latter if at all possible because it obviates the necessity to tinker with the very structure of our government.

Our first amendment protects the freedom of every American to think, to speak and to write and to defend and actually to offend beliefs as we please without the threat of a government stepping in with censorship or reprisal. We are different than any nation on earth of that. No major power in the world has ever had the complete freedom of speech that the United States has, but no other democracy has grown and flourished the way the United States of America has because of that. Because in the ability to dissent, we have diversity, and in diversity, we have democracy.

We're not the first generation to be asked for changes in the Bill of Rights, but if we do, then, of course, we have to ask ourselves, do we do this every time we disagree with the decisions of the Supreme Court.

If we disagree with them on abortion, do we amend the Constitution for that? If we disagree with them on civil rights, should we amend the Constitution for that? If we disagree on a criminal law decision, a search and seizure, a *Miranda* decision, do we amend the Constitution the next day for that? What about taxes? What about things that involve the environment? Do we each time amend the Constitution, and if each time we do, especially if we go into the Bill of Rights, do we not whittle away at what has made us strong as a democracy?

Mr. Chairman, I thank you for the courtesy of allowing me to speak out of turn. I ask unanimous consent for my remarks to be included in the record.

The CHAIRMAN. Without objection, they will be in. And I am sincere when I say the committee and the Senate thanks you for the job you're doing on the impeachment proceedings which, I might add, the Constitution requires, and although at the time it didn't contemplate a Senate with the schedule and a government with as significant a role as it now has, but thank you very much.

[The statement of Senator Leahy follows:]

STATEMENT BY SENATOR PATRICK LEAHY
August 1, 1989

Today, the Judiciary Committee addresses the issue of flag desecration. We will listen to the scholars and practitioners as we begin our careful and deliberate consideration of all of the options. Many of my colleagues and some of these witnesses will argue that we need an amendment to the Constitution to prohibit the desecration of the American flag.

I state at the outset that I firmly and unequivocally reject this option.

All of us here recognize that burning the American flag is a despicable act. Chairman Biden has a proposal that many constitutional scholars agree will not offend free speech values. It is a more sound, reasoned approach than any proposed amendment to the Constitution. And it obviates any need to tinker with the very structure of our government.

Our First Amendment protects the freedom of every American to think, to speak, and to write, to defend and to offend beliefs as we please without the threat of government censorship or reprisal. It ensures the rights of the minority -- even a minority of one -- in a political system run by the majority. These principles are so fundamentally American that we should resist any temptation to modify the First Amendment.

We are not the first and will not be the last generation to face cries for changes in the Bill of Rights. As we face the cries today, let us remember that each of us has sworn to "support and defend," not only the words, but the very essence of the Constitution.

We must pause and recognize the gravity of any amendment we consider, keeping in mind our responsibility to act as the conscience of our nation. We cannot betray the principles that underlie our democracy in the name of political expediency.

I keep asking myself and I ask our witnesses today to consider: If we vote to amend the Constitution to overrule the Supreme Court's decision in Texas v. Johnson this year, where do we stop?

Will the Constitution we all hold dear lose its majestic simplicity? I have said before and I say again today, if we start voting for constitutional amendments every time the latest opinion polls indicate public dissatisfaction with a decision of the Supreme Court, by the year 2000 we will need computer programs to decode our Constitution.

That notion is absurd, and I pledge not to let it become a reality. I will oppose any proposed Constitutional amendment aggressively.

The **Chairman**. Without further adieu, our next witness will be William Barr, the Assistant Attorney General for the Office of Legal Counsel at the Justice Department.

Mr. Barr, I don't think we've seen you up here since your nomination, so I extend a hardy welcome to you with your first appearance before the Senate Judiciary Committee at least. I believe you testified before the House Judiciary Committee, and we welcome your comments and recognize your interest as well as your scholarship.

STATEMENT OF WILLIAM P. BARR, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, ACCOMPANIED BY MICHAEL LUDIG, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL

Mr. **Barr**. Thank you, Mr. Chairman. Accompanying me today is Mike Ludig, who is the principal Deputy Assistant Attorney General of the Office of Legal Counsel.

Thank you for providing me the opportunity to appear here today. I am pleased to present to the committee the administration's views on a constitutional amendment to allow Congress and the States to prohibit the physical desecration of the flag of the United States.

At the outset, let me say that the administration applauds your leadership and the committee for moving forward with such dispatch to consider this very important matter of protecting the flag.

For reasons which I will explain, we believe that a constitutional amendment is the only way to protect the flag in the weight of the court's expansive decision. The President supports the constitutional amendment which has been cosponsored in the Senate by Senators Dole and Dixon. That proposal would amend the Constitution to provide simply this. The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States.

Most of us share a common ground. We believe that the flag should be protected from physical desecration. We want to do what is necessary to protect it. The question before us is this. How do we accomplish this?

Now, the central issue seems to be can we protect the flag with a statute or do we need a constitutional amendment. The Department of Justice, at the President's request, has carefully considered whether it is possible to protect the flag through a statute.

You have my assurance that the President and the Attorney General would be the first to support a statute if they thought a statute could survive constitutional challenge and protect the flag from desecration.

Unfortunately, we are convinced that in light of the expansive decision of the court, a statute simply will not suffice and that the only way to insure protection of the flag is through a constitutional amendment.

During my remarks this morning, I want to try to cover three points. First, why we believe a statute will be struck down and why a constitutional amendment is, therefore, necessary. Second, why we have serious concerns about the kind of statute being proposed even apart from its unconstitutionality. And third, what the constitutional amendment would do and why we think it is a reasonable way to proceed.

This is one of those rare instances where a fundamental policy call really turns on legal analysis. So first let me start with why we think an amendment is necessary. As you know, the court has held repeatedly that the first amendment covers not only speech, verbal and written but also certain kinds of conduct, conduct that is intended to convey a message. This is the symbolic speech doctrine.

So if someone wears an arm band for the purposes of conveying a message, the first amendment covers that person's activities and extends first amendment protection. Now, when someone is engaged in this kind of expressive conduct and the government comes along and says, stop. We have a rule that says you cannot engage in that conduct. We have a collision between the actor's first amendment interest in trying to convey his message through that conduct and the Government's interest behind the rule that says you cannot engage in that conduct.

When you have that collision, who wins? The court has applied two standards to determine who wins. The first is a very strict standard. It's called exacting scrutiny. Some people call it level one scrutiny.

Under this standard, the Government almost never wins. Then there's a more lenient standard which the court refers to as the *O'Brien* standard. Some people call this level-two scrutiny. Whereas under level one the Government needs a compelling interest to prevail, under level two the Government can win if it can show an important interest. So it's a more lenient standard.

Now, the whole issue here really is whether we can conjure up a statute by which we can escape level one exacting scrutiny and get down to the more lenient level-two scrutiny, *O'Brien* scrutiny.

Well, what does the court look to to determine whether you're going to be subject to exactly scrutiny or *O'Brien* scrutiny? Here's the key. The court looks to the Government's interest in seeking to control the conduct. The test is what is the Government's reason for the rule. If the Government's reason for the rule has nothing whatever to do with concern about the communicative effect of the conduct, then you can get under the lenient standard of *O'Brien*.

The CHAIRMAN. Would you repeat that last comment?

Mr. BARR. If the Government can show that its interest has nothing whatever to do with concern about the expressive or communicative effect of the conduct, then you can get under *O'Brien* lenient scrutiny.

If the Government's interest is related to concern about the communicative effect of the conduct, then you're under level-one scrutiny and the Government's rule is basically dead on arrival. If the Government's reason for the rule is that it ultimately wants to have an effect on expression, it's going to lose, the Government is going to lose.

A good question to ask yourself whenever you're looking at a rule is can the Government point to a public harm that is caused by the conduct that has nothing to do with the communicative aspects of that conduct. Now, let's see how these principles have been applied in the flag case.

Why do we want to protect the flag? Well, without exception, everyone today who talked about the reason for protecting the flag, and without exception everyone in the House that I've heard talk about why we want to protect the flag, has said we want to protect it as a symbol. As you have eloquently testified, Mr. Chairman, before the House committee, you said, "The flag is truly the nation's most revered and profound symbol representing what this country stands for."

Well, the court agrees. In the flag cases it says that the Government's interest is to protect the flag as a symbol of the Nation. Now, a symbol inherently has expressive content. That is what a symbol is. The flag stands for something. It has a meaning. It is not the Nation, but it stands for the Nation, and it stands for the Nation's values. It is not freedom itself, but it stands for freedom.

As the Court says, the flag is a form of symbolism, an effective way of communicating ideas, a shortcut from mind to mind. And as the court in *Johnson* said, "the flag is pregnant with expressive conduct."

Now, here is the central point. In two successive cases, *Spence* and *Johnson*, the Court has said that the Government's interest in protecting the flag as a symbol is necessarily and inherently related to expression, and consequently, a rule based upon a desire to protect the flag as a symbol, will fall under strict scrutiny, and it will fail because the Government's interests are not compelling enough.

In other words, the reason the Government wants to place restrictions on the use of the flag is because it wants to strengthen the flag's ability to convey a positive message as a symbol. So the Government wants to discourage conduct with the flag that impairs that positive message. To permit people to do bad things with the flag, conveys a bad message about the flag. It says that the things the flag stands for are not that important.

So *Spence* says, the Government has an interest in preserving the National flag as an unalloyed symbol of our country. If this interest is valid, we note that it is directly related to expression, therefore, *O'Brien* is inapplicable. And in *Johnson*, the same thing:

> The Government's interest in preserving the flag's special symbolic value is directly related to expression, thus it is outside of *O'Brien* all together.

Now, what does this mean?

The reason *Johnson* together with *Spence* is so devastating, is that it decisively has decided two things, first, the Government's interest in protecting the flag is inherently related to expression, and therefore, any rule to protect the flag is subject to strict scrutiny, exacting scrutiny, and second, the Government's interest is not sufficiently compelling to survive exacting scrutiny.

There is simply no way, if our interest is to preserve the flag as a symbol, there is no way to get around these two decisive points. Any statute, based upon protecting the flag as a symbol, will be subject to strict scrutiny, and it will be dead on arrival.

Now, I know Chairman Biden, you have proposed a statute, and others have proposed similar statutes. The House has proposed one that is similar, or at least will be considering one that is similar. And the idea behind it is that, well, the statute in *Johnson* seemed to just punish contemptuous conduct toward the flag, or at least offensive conduct toward the flag, therefore, if we broaden this statute beyond that scope, and punish conduct with respect to the flag regardless of whether it's offensive or contemptuous, then we can pass constitutional muster.

Well, there are two fundamental problems with this approach. First, it does not fix the constitutional problem, and second, it leaves you with an absurdly broad statute that no one really wants. It does too much.

Now, what is the flaw in the logic? The flaw in the logic is the mistake in thinking that the level of scrutiny depends upon the scope of the rule, how broad the rule is, rather than the reason for the rule. It's the reason for the rule that determines whether you are subject to strict scrutiny or lenient scrutiny. It does not depend on the scope of the rule.

Now, it's not just me saying this. The Supreme Court has specifically addressed this in *Spence*. In *Spence* there was a neutral statute very much like the statute you're proposing. It prohibited affixing anything to the flag. Intent did not matter. You did not need to have a contemptuous intent, nor did it make any difference whether you were trying to convey a message. It was just a flat out prohibition on attaching any foreign object to the flag. It covered the veteran who put his battalion pin. It covered someone who put a swastika on the flag. The court said, it doesn't matter that's neutral or appears to be neutral. The Government's interest is to protect the flag as a symbol, therefore, you are subject to strict scrutiny.

Consider the logic behind the statute, and think about how it would be applied in other contexts. Suppose that the premise is that you can sustain a prohibition on expressive conduct as long as you are also willing to extend a prohibition to people who have no expressive motive. Well, this is wrong. The thing that counts is the Government's motive, not the motive of the actor. If the Government's reasons are related to expression, the Government will lose.

Black arm bands. Suppose the Government starts out with a statute and says, we don't want you wearing black arm bands. The court strikes it down. It's not viewpoint neutral.

The State comes back and says, OK. You can't wear anything black above your waist in school, nothing, no shirt, no sweater, no black arm band. So we're not really—we don't care about expression. How long would that statute last?

Book burning, suppose the Government starts out with a statute and says, we like these 10 books. You can't burn them to show your dissatisfaction with the ideas contained therein. That's struck down. The State comes back and says, you can't burn these books, period. These 10 books, we don't want you destroying them. This is not because of the content of the books. This is because we want to protect the physical integrity of the books. Well, why do we want to protect the physical integrity of the books? Why the books and not something else?

A red flag, suppose we have a law which says, you cannot bear a red flag in order to show support for the Communists. It's struck down. Congress comes back with a statute and says, OK. You can't carry a red flag at all. Whether or not you intend to communicate anything. A flag is inherently expressive and it's clear that the reason for the rule is related to expression. The Government will lose on all those examples. Then we are left with an absurdly overbroad statute.

The problem, the constitutional amendment will permit Congress and the States to go and punish, as they have in the past, contemptuous conduct, which is the stuff that people find offensive. The statute will punish completely innocent conduct that no one is concerned about, and, in fact, patriotic conduct.

Let me give you an example. The statute has an absolute prohibition on defacement. Well, in order to be neutral, you have to prohibit any kind of defacement, whether it's patriotic or not. You cannot make a distinction between a swastika and a regimental emblem. If you do, you lose even the pretext of neutrality. And so you would have to prohibit patriotic inscriptions on flags, which have been permitted for time and memorial.

There's an absolute prohibition on any mutilation. Well, we can't make a movie now, under this statute, of Fort McHenry because the rockets red glare actually lit up the flag and it did damage to the flag. We can't show that. You cannot mutilate the flag as part of making a film.

Regardless of your intent, your purpose can be to ennoble the flag to help its symbolic value, and we're saying, no, you can't do it. As people have pointed out, the current statute extends to depictions of the flag. And so what we would have under the statute, newspapers could not print a masthead that covered the flag. You couldn't throw away an object, crumple it up and mutilate it, that had a depiction of the flag on it.

Now, these absurd results are not really what Congress wants. If Congress could do without this statute, it would. It would pass a statute like it did in 1968.

Now, let me give you an example of, you know, the kind of result that we get under this statute. This is the actual flag carried up San Juan Hill. It was carried by the lead unit, the 13th Regiment U.S. Infantry, and they proudly emblazon their name right across the flag, as you see; 1,078 Americans died following this flag up San Juan Hill.

Now, the bullets were like a hail storm that day, and so a lot of damage was done to this flag. Not all of it is evident because of the way it's folded, but a lot of battle scars are on this flag. Under the statute, you can't have regiments put their name on the flag, that's defacement. Nor could you ever show an accurate rendition of this battle. You could not show damage being done to the flag. Now, is that what we are really after? No. That doesn't make any sense.

And the reason we're doing this, the reason we're going through this is to get to the people who really engage in contemptuous conduct toward the flag. And the only way that can be done in a narrow and focused manner is through a constitutional amendment.

Mr. Chairman, I'll end my prepared remarks there and answer any questions that you might have.

[The statement of Mr. Barr follows:]

STATEMENT

OF

WILLIAM P. BARR
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE

THE

COMMITTEE ON THE JUDICIARY

OF THE

UNITED STATES SENATE

IN SUPPORT OF

A CONSTITUTIONAL AMENDMENT TO PROHIBIT
PHYSICAL DESECRATION OF THE FLAG
OF THE UNITED STATES

AUGUST 1, 1989

Mr. Chairman and Members of the Committee:

Thank you for providing me the opportunity to appear today. I am pleased to present to the Committee the Administration's views on a constitutional amendment to allow Congress and the States to prohibit the physical desecration of the Flag of the United States. This proposed amendment is prompted by the Supreme Court's recent decision in Texas v. Johnson, 57 U.S.L.W. 4770 (June 21, 1989), which ruled that a State cannot punish a person for burning the Flag. For reasons which I will explain, a constitutional amendment is the only way to protect the Flag in the wake of the Court's expansive decision. An amendment is the only way to adequately respond to the overwhelming--and understandable--sentiment of the American people that the Flag must be protected. I trust that few among us would disagree that the Flag is deserving of protection. As the symbol of our Nation, the Flag is the embodiment of our commitment to freedom. It stands in sacred honor of those who have sacrificed their lives in defense of that freedom. It holds in sacred trust the spirit of the American people.

Given the deserved reverence accorded the Flag, it is not at all surprising that the American people reacted with outrage when they were told that this Flag can be burned, shredded and spat upon with impunity. It would have been surprising had they reacted otherwise.

The President shares the profound sense of personal violation felt by the American people. He firmly believes that we have an obligation to the people to act swiftly and decisively to protect the Flag from those who would break our spirit through desecration of this one symbol that unites us.

We must be mindful that we here in Washington are but trustees of the will of the people; our authority is derivative. The will of the people is unmistakable. They want the Flag of the United States protected from those who would defile it.

I. INTRODUCTION

The issue that has occupied the lion's share of the time thus far is not whether to provide protection for the Flag, but how to provide that protection. Specifically, the debate has centered around whether an amendmont to the Constitution is required or whether a statute would suffice. The Department of Justice, at the request of the President, has carefully considered whether it is possible to protect the Flag through a statute. You have my assurance that the President and the Attorney General would be the first to support a statute if they thought a statute could survive constitutional challenge and protect the Flag from desecration. Unfortunately, we are convinced that, in light of the expansive decision of the Court, a statute simply would not suffice, and that the only way to ensure protection of the Flag is through a constitutional amendment. This is confirmed by even the most cursory reading of the Court's opinion.

The reason that a statute purporting to protect the Flag would be unconstitutional is simple. In Texas v. Johnson, the Court held that whenever someone burns the Flag for expressive purposes, that conduct is protected by the First Amendment; that to prohibit such conduct, the Government must have a compelling reason that is unrelated to expression; that the Government's reason for protecting the Flag (to preserve it as a symbol of national unity) is inherently and necessarily related to expression; and that the Government's interest in protecting the Flag as a symbol of our national unity can never be sufficiently compelling to overcome an individual's First Amendment interest in burning the Flag for communicative purposes. This reasoning plainly would extend to any Flag desecration statute enacted to protect the Flag as a symbol of our Nation.

We do not believe that it is necessarily unfortunate that an amendment is required. The amendment process serves as a reminder, lest we forget, that the law is of the people.

II. ANALYSIS OF TEXAS v. JOHNSON

To make an informed judgment as to whether an amendment is required, it is necessary to understand both the way in which the Supreme Court analyzes symbolic speech cases, and the reasoning employed by the Court in reaching its decision in Texas v. Johnson.

The Court has repeatedly held that the First Amendment extends to symbolic speech where the conduct was intended to convey a message and the likelihood was great that the message conveyed would be understood. See Spence v. Washington, 418 U.S. 405, 410-411 (1974). For example, the Court held in Brown v. Louisiana, 383 U.S. 131 (1966), that a peaceful sit-in in a public library to protest the library's policy of segregation was protected by the First Amendment. Where the Government attempts to prohibit, punish or otherwise burden communicative conduct, the Court carefully analyzes the Government's interest in imposing the burdens. If the Government's interest is unrelated to suppression of expression, the regulation is subjected to the comparatively more lenient standard set forth in the Court's opinion in United States v. O'Brien, 391 U.S. 367 (1968). Under that standard, the Government's interest must only be important or substantial to justify the regulation. Id. at 377. If, on the other hand, the Government's interest is related to suppression of expression, the regulation is subjected to the "most exacting scrutiny." Texas v. Johnson, 57 U.S.L.W. 4770, 4774 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)). Under this standard, the Government's interest must be compelling.

Turning to the decision in Texas v. Johnson, the threshold question addressed by the Court was whether Johnson's burning of the Flag constituted expressive conduct protected by the First Amendment. Noting that the Flag is "[p]regnant with expressive content," id. at 4772, the Court readily determined that

Johnson's burning of the Flag was "'sufficiently imbued with elements of communication'" id. (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)), to justify invocation of the First Amendment.

The Court then analyzed the interests advanced by the State in support of its Flag burning prohibition to determine whether those interests related to the suppression of expression. Texas v. Johnson, id. at 4772. The State of Texas asserted two interests in support of its prohibition on Flag burning: preventing breaches of the peace, and preserving the Flag as a symbol of nationhood and national unity. The Court held that the State's interest in preventing breaches of the peace was not implicated on the record because there was no evidence that Johnson's burning of the Flag actually caused a breach of the peace, and he was not prosecuted for breach of the peace. Id. at 4772-4773.

Significantly, however, the Court held that the government can never assume that Flag burning will cause a breach of the peace. Id. at 4773. Moreover, said the Court, Johnson's burning of the Flag as a "generalized expression of dissatisfaction with the policies of the Federal Government" was not the equivalent of "fighting words" that could cause a breach of the peace because "[n]o reasonable onlooker" would regard it as a "direct personal insult or an invitation to exchange fisticuffs." Id. The Court went on to say that its precedents "recognize that a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" Id. (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

The Court then turned to the State's asserted interest in preserving the Flag as a symbol of our Nation. It held that this interest was directly related to the suppression of expression: "[T]he Government's interest in preserving the flag's special symbolic value 'is directly related to expression in the context of activity'" intended to express a message. Id. (quoting Spence, 418 U.S. at 414 n.8). Because the State's interest in preventing Flag burning was related to expression, the Court held that the considerably less demanding standard of O'Brien did not apply, and that the State's interest must be subjected to the "most exacting scrutiny." Id. at 4774.

The Court held that Texas' interest in preserving the Flag as a symbol of our Nation and national unity could not justify its prohibition on Flag burning. The Court reasoned that governmental protection of the Flag because of its symbolic importance to the Nation would be tantamount to a governmental directive that the "symbol be used to express only one view of that symbol or its referents." Id. at 4775. The Government, said the Court, may not "foster its own view of the flag by prohibiting expressive conduct relating to it." Id. Any attempt to preserve the Flag as a symbol offends the "bedrock principle" that "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Id. at 4774. Finally, the Court explicitly refused to accord the Flag any special constitutional significance, finding "no indication - either in the text of the Constitution or in [its] cases interpreting it - that a separate juridical category exists for the American flag alone." Id. at 4775.

III. CONSTITUTIONALITY OF FLAG DESECRATION STATUTES AFTER TEXAS V. JOHNSON

We think it is plain under this reasoning that any statute prohibiting desecration of the Flag for communicative purposes would be unconstitutional. The Flag is by nature communicative. It is a symbol "[p]regnant with expressive content." Id. at 4772. Thus, the Government's interest in preserving the Flag as a symbol is inherently related to expression. It is precisely because the Flag is the symbol of this Nation that the Government wants it protected against conduct that will undermine its communicative force, i.e., conduct that will prevent or interfere with the message communicated by the Flag. As the Court observed in Texas v. Johnson, the Government "is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, we do not enjoy unity as a Nation." *Id*. at 4773. Accordingly, any Flag desecration statute will be subject to the "most exacting scrutiny."

The Court has held that under this exacting scrutiny the Government's interest in preserving the symbolic value of the Flag can never be sufficiently compelling to stop an individual from desecrating the Flag whenever the desecration is done for communicative purposes.

An asserted interest in preventing breaches of the peace would not save the statute because the Court also held that the Government may never assume that Flag burning or other Flag desecration will cause a breach of the peace. Moreover, the Court has said that desecration of the Flag ~~as~~ a "generalized expression of dissatisfaction with the policies of the Federal Government" cannot cause a breach of the peace because "[n]o reasonable onlooker" would regard it as a "direct personal insult or an invitation to exchange fisticuffs." *Id*. at 4773. The Court's categorical rejection on these grounds of the only two conceivable interests for prohibiting the desecration of the Flag render it certain that the Court would strike down any such statute.

It has been argued that the Court would uphold a statute if it prohibited *all* Flag desecration, whether in public or private, and whether done with contempt or not. This argument is demonstrably wrong because it assumes that the Government's reason for enacting a facially neutral prohibition (that is, a statute neutral as to the *particular* viewpoint expressed) would be "unrelated to expression." It would not be. The Government's reason for passing a viewpoint-neutral prohibition would be the same as its reason for passing a prohibition on contemptuous desecration only: protection of the symbolic value of the Flag. The Supreme Court has held in two successive cases, Spence v. Washington and Texas v. Johnson, that it is the Government's reason for the prohibition, not the scope of the prohibition, that determines the level of scrutiny. Because the Government's reason for protecting the Flag is necessarily related to expression, the prohibition would always be subjected to exacting scrutiny, and therefore would never prevail over an individual's First Amendment interest in expressive conduct.

In essence, the argument fails to appreciate that a statute neutral as to the particular viewpoint expressed can nonetheless be unconstitutional if its prohibition is content-based (i.e., related to expression). The Supreme Court has distinguished between "content" and "viewpoint" regulation. See, e.g., Boos v. Barry, 108 S. Ct. 1157, 1163-1164 (1988). If the regulation is either content-based or viewpoint-based, it is subject to the "most exacting scrutiny." Id. Importantly, a regulation can be viewpoint-neutral, but content-based. Id. Even assuming that the proposed statute would be held to be viewpoint-neutral (which itself is doubtful), it would never be held content-neutral.

A statute is content-neutral only if its restrictions on communicative activity "are justified without reference to the content of the regulated speech." Id. at 1163 (quoting Virginia

Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)). Its restrictions must have "nothing to do with that speech;" the statute must not have been "aim[ed] at the suppression of free expression." Id.; see also Texas v. Johnson, 57 U.S.L.W. 4770, 4774.

The restrictions imposed on speech, even by a facially neutral Flag desecration statute, neither would nor ever could be justified by anything other than the Government's interest in protecting the symbolic value of the Flag. (Any legislative determination to the contrary would plainly be pretext and would be recognized by the Court as such. See, e.g., Wallace v. Jaffree, 472 U.S. 38 (1985)). Indeed, in Spence v. Washington, the Court considered a facially neutral statute virtually identical to the statute now proposed. Prosecution under the statute at issue in that case, like under the statute proposed here,

> [did] not depend upon whether the flag is used for communicative or noncommunicative purposes; upon whether a particular message is deemed commercial or political; upon whether the use of the flag is respectful or contemptuous; or upon whether any particular segment of the State's citizenry might applaud or oppose the intended message.

Spence, 418 U.S. at 422-23 (Rehnquist, J., dissenting). In holding the statute unconstitutional as applied to a person engaged in communicative conduct, the Court explained that

> [even] [i]f [the government's interest in preserving the value of the Flag as a symbol of our Nation] is valid, we note that it is directly related to expression in the context of activity like that undertaken by appellant.

Id. at 414 n.8. Justice Brennan, the author of the Court's opinion in Texas v. Johnson, in fact has previously written that,

> the only basis for a governmental interest (if any) in protecting the flag is precisely the fact that the flag has substantive meaning as a political symbol. Thus, assuming that there is a legitimate interest at stake, it can hardly be said to be one divorced from political expression.

Kime v. United States, 459 U.S. 949, 953 (1982)(Brennan, J., dissenting). And the Supreme Court in Texas v. Johnson has now held that the Government's interest in protecting the Flag as a national symbol is, by definition, related to the suppression of free expression. Thus, it simply could never be successfully maintained that such a statute was content-neutral. The statute is not rendered content-neutral merely because it prohibits private desecrations as well as public desecrations of the Flag. The Government's purpose in prohibiting the desecration is the same whether or not the statute extends to private conduct.

Because any statute would necessarily relate to expression, the more relaxed standard of O'Brien would never apply, and the statute would always be subject to the "most exacting scrutiny." The Supreme Court in Texas v. Johnson has now unequivocally held, however, that the government's interest in protection of the symbolic value of the Flag will never support a prohibition on the communicative desecration of the Flag under this heightened standard. As Justice Brennan has said, "any governmental interest in protecting the flag's symbolism is one that cannot pass muster under the third branch of the O'Brien test." Kime v. United States, 459 U.S. at 953 (cert. denied, Brennan, J., dissenting). Moreover, the Court has flatly refused to recognize a separate constitutional or juridical category for the Flag.

In the face of the Court's holdings in Texas v. Johnson, and Spence v. Washington, and especially given the sweeping reasoning in those cases, it cannot be seriously maintained that a statute aimed at protecting the Flag would be constitutional. Significantly, Justice Brennan himself has even written that a statute "that simply outlawed any public burning or mutilation of the flag, regardless of the expressive intent or nonintent of the actor," would be "invalid for the reasons stated in . . . Spence." Kime v. United States, 459 U.S. at 955 n.7.

IV. PROPOSED CONSTITUTIONAL AMENDMENT

If we are interested in protecting the Flag from desecration, the focus should be on the various amendments that have been proposed in the two Houses of the Congress. Today, I would like to discuss the amendment that has been proposed by Senators Dole and Dixon, and endorsed by the President. That amendment reads: "The Congress and the States shall have power to prohibit the physical desecration of the Flag of the United States."

The first, and perhaps most important, point to be made is that the amendment does not itself prohibit Flag desecration. The amendment merely empowers Congress and the States to prohibit legislatively the physical desecration of the Flag, and establishes the boundaries within which they may legislate. With the ratification of this amendment, Congress and State legislatures, the representatives of the people, would be able to decide if they want to prohibit Flag desecration, and if so, in what manner. We believe it is fitting that the people should decide through their elected representatives the extent to which they wish to prohibit desecration of their national symbol. This amendment gives them that opportunity.

The amendment would define the framework within which the legislative authority of the Congress and the States could be exercised. Within this framework, however, the Congress and the States would have wide latitude to prohibit that conduct toward the Flag that they believe deserves proscription.

If Congress and the States chose to legislate, as we anticipate they would, they would be permitted and obliged to draw lines. For example they would have to determine how they wished to define "Flag" and "physical desecration" of the Flag. They would have to decide whether to make intent a necessary element of a Flag desecration offense. Doubtless, there would be other questions as well. I can describe the general nature of the decisions that would have to be made on the principal issues. But again I would emphasize that this amendment creates only the necessary framework; the bulk of the decisionmaking would be left to the legislatures.

The first question that the legislatures would face is how to define "Flag." There would be any number of options that would be permissible under the amendment. Let me discuss three of the most obvious. First, "Flag" could be defined narrowly as only a cloth, or other material readily capable of being waved or flown, with the characteristics of the official Flag of the United States, as described in 4 U.S.C. § 1. (This definition could also include historic versions of the Flag (i.e., a 13-star version)). A benefit of such an objective definition is that there would be absolute certainty as to what one would be prohibited from desecrating. One of the costs of such a narrow definition, however, is that legislatures would not be prohibiting acts that are just as damaging to the symbolism of the Flag as desecration of the Flag itself. People would simply circumvent any statutory prohibition by desecrating a Flag that is slightly different in an undetectable way from the actual Flag. For instance, they would burn or shred a Flag that has only 49 stars, or one on which the stripes are of incrementally different dimension, but is otherwise identical to the official Flag. While we believe the amendment would certainly permit the legislatures to define "Flag" in this manner, legislatures would be free to adopt a broader definition, as Congress itself has done.

A second option for the legislatures would be to define "Flag" as anything that a reasonable person would perceive to be a Flag of the United States meeting the dimensions and having the characteristics of the Flag as set forth in 4 U.S.C. § 1, and capable of being readily waved or flown, whether or not it is precisely identical to the Flag as so defined. This definition would extend protection to any Flag with a slight variation (i.e., a Flag with a stripe missing). However, it would not prohibit destruction of a poster or a painting of the Flag, or the painting of a picture of the Flag with a swastika on it, because a reasonable observer would not mistake such an object as an actual Flag. In this regard, the definition is substantially narrower than the existing federal statute, which extends to any object that "an average person seeing the same without deliberation may believe . . . to represent" the Flag. 18 U.S.C. § 700(b).

A third option for Congress and the States would be to define "Flag" as it is defined in the existing federal Flag desecration statute, 18 U.S.C. § 700(b). The federal statute prohibiting Flag desecration, 18 U.S.C. § 700(b), defines "Flag" as follows:

> any flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, color, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America.

18 U.S.C. § 700(b). In general terms, this definition includes any Flag, portion of a Flag, or any picture or representation of a Flag. It would allow the legislatures to protect depictions of

the Flag, such as posters, murals, pictures, buttons, and any other representation of the Flag. This definition would be consistent with the Government's interest in preserving the Flag's symbolic value because it recognizes that the desecration of representations of the Flag damage that interest as much as desecration of the Flag itself. I would note that even the legislative proposals proffered to redress the Court's decision would retain this definition of Flag.

Regardless of how "Flag" is defined, however, Congress and the State legislatures would have to define the term clearly to avoid successful challenge on the ground that they are unconstitutionally vague. In fact, it is worth noting that many Flag desecration statutes have been invalidated on the ground that they were unconstitutionally vague. See, e.g., Smith v. Goguen, 415 U.S. 566 (1974).

We believe the phrase "physical desecration," too, would provide some latitude to Congress and the States, although the amendment would significantly channel the legislative decision. There are two discrete aspects of the term "physical desecration," "physical" and "desecration." The amendment would not permit Congress or the States to punish or penalize any non-physical desecration of the Flag. Some contact with the Flag, some physical touching of the Flag, whether by the person himself or caused by the person would be essential. The legislatures thus could not punish or penalize mere words or gestures directed at the Flag, regardless of their offensiveness.

The amendment would simply import the common-sense understanding of the term "desecration." Webster's Ninth New Collegiate Dictionary defines "desecrate" as follows: "1. to violate the sanctity of: PROFANE 2: to treat irreverently or contemptuously often in a way that provokes outrage on the part of others." Black's Law Dictionary contains a similar definition of "desecrate": "To violate sanctity of, to profane, or to put to unworthy use." These definitions capture the essence of the term as used in the amendment. Indeed, these definitions make clear that a ban on "desecration" is particularly well suited for preserving the symbolic value of the Flag.

There are an infinite number of forms of desecration. I will not attempt even a representative listing here. But obviously, the legislatures could clearly prohibit the burning, shredding and similar defilement of the Flag.

I would note, however, that we do not understand that the legislatures could ever prohibit the proper display of the Flag merely because they believe the particular surroundings of the display are unfitting for the Flag. The proper display of the Flag, without more, could never constitute an act of physical desecration. We simply do not believe the Government should be in the position of making value judgments about whether the proper display of the Flag in particular settings and by particular persons is nonetheless demeaning. As long as the Flag is displayed in a customary manner, and not physically mistreated, the amendment would not authorize punishment or penalty. Of course, the legislatures could constitutionally prohibit the display of the Flag in a manner that they deemed inappropriate because such proscriptions would not require value judgments about who could display the Flag or where it could be displayed. Thus, they could prohibit, for example, the display of the Flag on the floor or the upside-down display of the Flag.

Beyond this, I would simply urge the Committee not to lose sight of the ultimate objective of protecting the Flag by becoming mired in countless hypotheticals that can be posed to test at the margins choice of the term "desecration." One can always construct hypotheticals that push the limits of any word in the language. This is as true of statutory language as it is of constitutional language. In the end, those who are responsible for the ultimate choice of language, must simply choose terms that most clearly reach the conduct they wish to reach, and only that conduct. At the margins, one has no choice but to rely upon the individual legislatures in the first instance, and ultimately on the courts, to prevent application of the language in a manner that would do injustice to the drafters' intent.

We believe that the phrase "physical desecration" is sufficiently flexible to permit the Congress and the States to reach all physical acts of desecration with which the people are concerned, yet sufficiently exacting to prohibit them from reaching activity that is properly protected.

The third area in which Congress and the States will have to draw lines relates to the actor's state of mind. The amendment only authorizes prohibition of voluntary actions; involuntary acts--such as accidents--could not be punished. The more difficult issue is whether the actor must intend to be contemptuous toward the Flag. We believe Congress and the States are, and should be, free to decide whether to require intent. We suspect that they will choose to require that the actor intend to cast contempt. Because the overwhelming number of physical acts that are of concern to us are intended to express contempt for the Flag, we would not be especially troubled were they to choose to require intent. Nevertheless, there may well be conduct that the legislatures would want to prohibit, irrespective of the intent of the actor, and they would be permitted to do so under the amendment. The legislatures would be free to impose an intent requirement or not, as they deemed appropriate.

We think offering legislatures the option of prohibiting only intentionally contemptuous, physical desecration represents a significant advantage of the amendment over the proposed statute. Presumably to convince the courts that its proscriptions are unrelated to expression, the proposed statute would _require_ that the Government prohibit acts without regard to whether they cast contempt. Thus, a child who innocently steps on a Flag, a person who crumbles a Fourth of July Flag-decorated paper cup, or a veteran who burns an old Flag out of reverence and respect would all presumably be prosecutable under the proposed statute. While we do not believe that most people want to prohibit actions, such as those identified above, when they are not done to cast contempt, we believe that Congress and the States should be free to make that determination as they see fit, to create the exceptions that logic and reason compel.

By way of summary, the Dole-Dixon amendment confers substantial discretion on Congress and the States to determine precisely the degrading acts toward our Flag that are to be prohibited. The amendment gives them the latitude to draw reasonable lines that will reflect the conscience of the people. The Administration believes that this is as it should be.
The proposed statute not only prohibits much conduct that no one wishes to prohibit; ultimately it would not constitutionally prohibit the very acts that we wish to prohibit.

CONCLUSION

On behalf of the President, I urge the prompt approval of the Dole-Dixon Amendment so that the ratification process may begin.

The CHAIRMAN. Tell me how the constitutional amendment works if you will, please.

Mr. BARR. Sure. The constitutional amendment itself does not prohibit flag desecration. It empowers Congress and the States to pass laws that prohibit physical desecration. Now, like a statute, the legislature will have certain choices to make in drawing those lines. The problem with the statutory approach that's being proposed is that you don't have a choice. You have to draw the line all the way out on the extreme point. In other words, the statute that's being proposed goes to the very fringe of what would be permissible for any legislative body to pass under the constitutional amendment.

Now, the amendment sets a general framework, certain boundaries. And within that, the legislatures can make certain choices. For example, what is a flag? Basically three options, you could say it would be the official flag of the United States, but it has to actually be the flag. You could say it's what a reasonable person would perceive to be a flag. So a 49-star flag that's burned would be covered. Or you could go still further and say that representations or depictions of the flag would also be covered. And, in fact, it's that last step that Congress took in the 1968 statute. Congress has already gone the whole hog and covered all three of those. Physical desecration would be the next term that the legislatures would deal with.

We read "physical" as requiring a physical contact with a flag by a person or caused by a person. So you can't punish words or gestures. It actually has to be physical contact with the flag.

The word "desecrate" we believe imports the common sense understanding of that term, and requires that the contact would have to be such that an objective observer would reasonably perceive it to be contemptuous.

Legislatures could not prohibit the proper display of the flag merely because they believe the particular surroundings unfit. There would actually have to be contact with the flag that a reasonable observer would view as contemptuous conduct.

Then the final choice would be state of mind. Now, the legislatures will have a choice as to whether to require a contemptuous state of mind or not. Now, 48 States and Congress have generally required contemptuous intent, because 99 percent of the conduct is contemptuous toward the flag. And so if you look at the State laws and if you look at what Congress has already passed, it's limited to contemptuous actions. We think that most States and Congress will continue to require a contempt state of mind. There may be circumstances, however, where they would like the latitude to go beyond that, for example, to prohibit the display of the flag on the ground without having to show intent. So there is flexibility under the constitutional amendment.

The problem with the statute is that in order to try to slalom through the constitutional obstacles, the statute requires that there be no intent requirement, no contemptuous intent requirement, and that people can be punished regardless of their motives.

The CHAIRMAN. So what we are trying to get at here in the amendment is not only preventing physical desecration, but we're also trying to get at the reason, the intent. We're trying to get at the communicative impact. We're trying to get at the speech; is that right?

Mr. **Barr**. No. Under the constitutional amendment, we are trying legislatures the latitude to identify the kind of conduct they want to prohibit.

The **Chairman**. But if they want to do that, they can? In other words, if the legislature wants to, under the President's amendment, get at speech, they can do that? In other words, they can define what contemptuous is, can't they? They can say, if you say anything that relates to positions held by the Communist Party or the Fascist Party or relates to criticisms about elected officials in the State, the Governor, the Senators, that's contemptuous?

Mr. **Barr**. No, Mr. Chairman. As I said, the constitutional amendment would not permit the prohibition of words or gestures. It would only permit legislatures to prohibit physical contact with the flag that could be reasonably understood to be contemptuous. So it would permit States to say, trampling on the flag is prohibited.

The **Chairman**. That's the kind of statute a State could pass. Could they pass a statute allowing me to burn the flag saying, I burn this because my heart is broken and because *x* number of marines were killed in Lebanon, and I'm offering this flag up as a symbol of the fire and tragedy that they underwent prior to their death? Could they——

Mr. **Barr**. Well, under your statute, that person would have to be prosecuted regardless of intent.

The **Chairman**. That's correct.

Mr. **Barr**. Under the existing law, the Government would have to show the person was intending to cast contempt upon the flag.

The **Chairman**. I see.

Mr. **Barr**. The constitutional amendment would give the legislatures the discretion along that spectrum.

The **Chairman**. So what the legislatures could do, they could effectively make judgments about censoring certain kinds of speech related to the rationale of desecrating the flag, destroying the flag, and distinguish among them. They could say, you can destroy the flag if you're doing it in the name of the Democrat and Republican Party and offering it up as a symbol of the heroism of those who were consumed in the flames of war, and they could allow that. But they could say it was contemptuous if the flag was being burned, burning the flag saying, I burn this flag because I believe the Government of this State and this Nation is represented by that Governor who is a bonehead sitting up there and is an absolute idiot, and so I burn the flag to demonstrate my contempt for him, for the State legislature, and for the State government.

Mr. **Barr**. The constitutional amendment would permit the legislature to make a distinction between contemptuous treatment of the flag and innocent treatment of the flag. So the legislature could say, for example, that it is not defacement of the flag to permit military units to put their insignias on the flag, which they have done for time and memorial. That seems to us to be quite reasonable.

The **Chairman**. The State could also make distinctions of what—it could affect free speech associated with—in defining what is contemptuous, the legislature could be as pernicious or as consistent with what is heretofore been considered the latitude of speech in this country in making a judgment whether the action was, in fact, legitimate or illegitimate, was a violation of the law or not a violation of the law; is that right?

Mr. **Barr**. Well, within the confines of the constitutional in the language, the legislature has latitude in the three areas that I suggested. Your amendment prohibits a lot of speech.

The **Chairman**. Let's assume for purposes of this discussion that my amendment makes no sense.

Mr. **Barr**. Your statute, I mean.

The **Chairman**. My statute, let's assume it makes no sense. So I will grant that to you for the purposes of this discussion. So my statute makes no sense.

Now, let's move to the constitutional amendment, and let's just focus on that. We've now concluded my statute not only is not constitutional, would not pass constitutional muster, but it would be bad policy even if it would pass constitutional muster, because that's essentially what you're saying, right?

Mr. **Barr**. Yes.

The **Chairman**. Now, let's talk about the amendment.

As I understand the amendment, because the legislature has the latitude, at least in three areas under the amendment, one of those areas is actually to regulate speech; is that not correct? That's the latitude it has, the speech related to the destruction for purposes of a court determining whether or not it was contemptuous.

Mr. **Barr**. I'm not sure what you mean by regulate speech. The legislature can determine whether it wants to limit the prohibition to contemptuous handling of the flag.

The **Chairman**. But it defines what contemptuous is, doesn't it? It can define what contemptuous is?

Mr. **Barr**. Well, as long as—well——

The **Chairman**. Let's assume the legislature passed a law saying that if there's any destruction or desecration of a flag and associated with that destruction is criticism of the existence of a deity, the sanctity of the government of the State of South Carolina, and the wisdom of the leadership of the United States; it could do that, couldn't it?

Mr. **Barr**. Well, the limitations would be that the conduct would have to be the physical desecration of the flag.

The **Chairman**. That's right. It would have to result in the physical desecration.

But whether or not the physical desecration was done contemptuously, because obviously if it wasn't done contemptuously, it's not a crime. If you go under the existing rules, whether it's the Boy Scout Handbook, and I'm not being facetious, or military regulations and destroy a flag, "desecrate a flag," it's not desecration, per se, by burning the flag, destroying the flag, because that's the way it is done under the handbook, the rules. I'm not being facetious when I say this. So that's not contemptuous.

So whether or not you are guilty of violating the law will depend upon what the legislature and/or the court in that State defines as contemptuous, correct?

Mr. **Barr**. Well, let me approach it this way. Contemptuousness can come in in two ways. First, the physical act itself, the physical desecration itself has to be the kind of conduct that a reasonable observer would understand to be contemptuous. So that the legislature could not prohibit kissing the flag because the act itself does not fall within the common import of the word desecration.

The **Chairman**. Oh, I see. I'm confused now.

Mr. **Barr**. Now, second, the legislature would have discretion to determine whether there was a mens rea requirement in the sense that there was a requirement that the act, which would normally be understood as contemptuous, was in fact contemptuous.

The **Chairman**. Understood by the person——

Mr. **Barr**. The reasonable observer. So that——

The **Chairman**. Wait. You said mens rea, mens rea is——

Mr. **Barr**. State of mind.

The **Chairman** [continuing]. State of mind of the person perpetrating the act, not the observer.

Mr. **Barr**. Correct.

The **Chairman**. So there's two points you're making here, as I understand it. I'm sorry to take so long, but I'm having trouble understanding this.

The first point is whether or not the observer—I take a flag, and it's an actual flag, and I stand here and I look to all of you and I say, I'm going to burn this flag. That's all I say. I don't say anything. I just take it up, I borrow a match from Senator Kennedy or Senator Thurmond, light, end up putting it in an ashtray and burn it.

Now, the first test of whether or not I am guilty of a crime would be what you all thought of it. If reasonable people looking at what I did thought what I did was a contemptuous act, then one of the tests is met toward my guilt, correct?

Mr. **Barr**. Right. The legislature would have made a reasonable judgment that burning the flag could be interpreted as physical desecration.

The **Chairman**. Right. OK. Now, there's a second test, mens rea. What was Joe Biden thinking of at the time? What Joe Biden was thinking, did he understand what he was doing? What was his intent? Was Joe Biden's intent to cast contempt upon, to desecrate the flag? Because we both agreed that if I, through a ceremony, and I'm not being facetious with General Thurmond—and he is a general—with General Thurmond, we in this room take a tattered flag and we burn it, don't say a word, but we go through a process silently, and we burn it, we may be burning it by the book, by the handbook. So although I desecrated it, you know, it's been burned, it's been destroyed, I'm not guilty of anything?

Mr. **Barr**. That's the reason we do not prosecute people who are cremated with the flag today. That's the reason we do not prosecute veterans who destroy the flag.

The **Chairman**. Right. I understand that.

So the point I'm trying to make, though, is that you all looking on are going to say, well, General Thurmond and his assistant, Mr. Biden, they just burned that flag because that's the way you do it with tattered flags, that's the way the military does it. But if Joe Biden, or anyone else, burns the flag, doesn't say a word, just stood here and burned it. I walked out here, and just to make a point, and had a large trash can behind it, which is not unusual for things like this to happen for demonstrable purposes in the Senate or in the House or Congress or with Presidents, and just turned and lit the flag and sat down, and just sat here and smiled while it burned behind me. One of the things is, would a reasonable person sitting out there think the act that I just did, lighting a match to that flag, was it contemptuous? Did I do it because I was casting contempt upon that flag?

Mr. BARR. That would be the first inquiry.

The CHAIRMAN. That would be the first test, right?

Mr. BARR. To determine whether——

The CHAIRMAN. Whether I'm guilty or not?

Mr. BARR. No. That would be—if the statute prohibits burning, the first issue is——

The CHAIRMAN. Wasn't that desecration? Isn't burning desecration?

Mr. BARR. The inquiry on whether it's physical desecration comes in when you're looking at the statute to see if the statute is within the scope of the constitutional power.

The CHAIRMAN. OK.

Mr. BARR. So if the statute says, we prohibit burning of the flag to cast contempt on the flag, let's just say that that's the statute, which is essentially what the statute is today. The first issue is, well, could the legislative body have prohibited burning? The answer is yes, because it falls within the framework of physical desecration.

How do we know that? Because the ordinary person would say that burning can be——

The CHAIRMAN. Can be.

Mr. BARR [continuing]. Can be contemptuous, would normally be perceived as contemptuous if you're burning the flag. That's where that inquiry comes in.

Then if you were prosecuted, the question would be, did you meet the state of mind requirement of the statute, which would be——

The CHAIRMAN. Well, wouldn't you have to establish in court in prosecuting me that it did meet the test, the first threshold test that it was contemptuous?

What would happen if I stood in court under the hypothetical statute we are talking about that the Constitution allows and said in court I burned that flag out of love of my country, I burned that flag because I felt so strongly about it? I wanted everyone in here to look at that flag and understand what it meant, and the most stark way to have that happen would be to burn it.

Mr. BARR. The Government would have the burden of establishing beyond a reasonable doubt that you were casting contempt upon the flag.

The CHAIRMAN. Right, OK. Now, we are back to the only thing I was trying to establish.

So the Government has the burden of establishing that my action was contemptuous. Then the Government would also have the burden of proving that I knew it was contemptuous, I meant it to be contemptuous, that that was my intent?

Mr. **Barr**. That is what I just said. That is what I was just talking about.

The **Chairman**. OK. Where does the mens rea come in?

Mr. **Barr**. The mens rea——

The **Chairman**. That is the mens rea?

Mr. **Barr**. Right.

The **Chairman**. OK.

Mr. **Barr**. Now, what happens if the legislature passes a law that says that if one were to burn the flag and while burning it suggest that the burning was for the purpose of casting contempt not only upon the flag but God and the elected officials of this State and this country?

Mr. **Barr**. Well, I do not think that that would be within the framework of the constitutional amendment.

The **Chairman**. Why?

Mr. **Barr**. Because the constitutional amendment empowers punishing, physical desecration of the flag. Now, that power cannot be exercised—it does not grant you the power to protect, for example, the name of the deity.

The **Chairman**. Well, I am talking too much time here. I have other questions. I will come back.

Let me yield to my colleague from South Carolina.

Senator **Thurmond**. Mr. Chairman, I would like to discuss with you just a moment. Judge Bork is here. He has got to catch a train at 4 o'clock; he has to leave here by 3:30. Would it be possible if we can get Mr. Barr to agree to stand aside and take him and Mr. Cooper now? Or would you want him to come back at another hearing?

The **Chairman**. Well, I do not want to inconvenience Judge Bork. But the same request has been made by two other of our witnesses who are from out of town, and also by our former colleague who wished to come back. I would be reluctant to do that unless we could have the staff go out and find out whether everyone who is to testify is willing to change—because the order was known for some time.

Senator **Thurmond**. We can run as late as necessary to accommodate everybody.

The **Chairman**. Sure.

Senator **Thurmond**. But those catching a plane or a train at a certain time, I thought we could take then first.

The **Chairman**. I would be happy to attempt to do so.

Let us keep going with Mr. Barr, and I will ask the staff to contact each of the witnesses now to see what their scheduling requirements are.

In the meantime, let us continue. Any of the other three people, they may also have 4 o'clock trains or planes. So I do not want to take it out of order unless we know that we are not inconveniencing the other witnesses as well.

Senator **Thurmond**. If the other witnesses have schedules at a definite time.

The **Chairman**. That is what I am trying to find out.

Mr. **Barr**. I have to leave the country this evening.

Senator **Thurmond**. What?

Mr. **Barr**. I have to leave the city by 5 o'clock.

The CHAIRMAN. Mr. Barr has to leave the country.

Mr. BARR. I am leaving the city and then leaving the country tonight.

Senator THURMOND. Well, you would have a little more time if Judge Bork went on to catch his train, would you not, if you stand aside now? Would you be willing for Judge Bork to go ahead, and it should not take over 30 minutes, and then bring you back, Mr. Barr? I am asking you if you want to do this. It is up to you though.

Mr. BARR. Yes, I am willing to stand aside for 30 minutes.

The CHAIRMAN. You are willing to stand aside for 30 minutes assuming everyone is willing to stand aside.

Now, let us just continue the questioning. Our staffs, yours and mine, are out there trying to figure out what the witnesses 'schedules are. I promise you I will attempt to accommodate Judge Bork. His testimony is important. I want to hear it. But let us move on and not waste time while we are asking those questions. It will take another five minutes to find out what the schedules are.

Senator THURMOND. Well, Judge Bork has to leave here in 30 minutes to catch his train.

The CHAIRMAN. I understand that.

Senator THURMOND. Well, if the witnesses are here, let them stand up now and say what they can do.

The CHAIRMAN. Is there any witness that has to leave town, as Mr. Barr does, by 5 o'clock?

Senator THURMOND. By 4, he has to leave at 4 o'clock.

The CHAIRMAN. I know. This is not a fruitful discussion in open session. Let me——

Senator KENNEDY. Mr. Chairman, I have just a few questions for Mr. Barr. I will be glad to proceed in any way that you——

The CHAIRMAN. Why do you not proceed with questions while I check this out.

Senator KENNEDY. Mr. Barr, in your testimony, you point out the Congress and the states would have wide latitude if this amendment should go in effect to prohibit that conduct towards the flag that they believe deserves proscription.

In construing the amendment I imagine that future courts will look to Congress' intent. And one major place where that intent is apparent is in the preamble to the amendment. And that preamble makes it clear that physical desecration includes "displaying the flag in a contemptuous fashion."

And then in your testimony you define this desecration. Your own testimony quotes Black's Law Journal as defining desecration to include "To put to an unworthy use." Put to an unworthy use. And as the chairman has tried to better understand, you know, what we are really driving at, to be put to an unworthy use, couldn't this amendment authorize Congress or a legislature in the future to decide that using the American flag in political commercials is an unworthy use?

Mr. BARR. Well, no, Senator. What I testified before was that we understand the term "physical desecration," first the term "physical" requires some kind of physical contact with a flag apart from its normal display. We do not believe that the government can get into the business, or legislatures can get into the business, of determining who is worthy, the moral worth of individuals or contexts in which the flag is displayed. As long as the flag is displayed in a customary manner in a way that does not involve some kind of contemptuous contact, with the flag, we do not believe it would be within the power of the legislature to proscribe.

Senator KENNEDY. Well, the preamble mentions that "the physical desecration may include, but is not limited to," and then it says, "or displaying the flag in a contemptuous manner." And your testimony describes contemptuous manner, as I said, "to put to an unworthy use." And wouldn't you say that there are those who believe that using the flags in a political commercial is an unworthy use?

Mr. BARR. Well, my whole testimony, and what I have just said is, that the word "physical" requires physical contact with the flag. We understand the word desecrate to require a contact that would be such that an objective observer would reasonably perceive it to be contemptuous.

We do not believe that the constitutional amendment, for example, would authorize a legislature to prohibit some kinds of people from displaying the flag because the display of the flag does not involve an abusive physical contact with the flag and it does not involve desecration within the common import of that word. And we do not think that the legislature should get into the business of deciding who is morally worthy to display the flag.

Senator KENNEDY. Well, as to "displaying the flag in a contemptuous manner," what if a politician were to wrap him or herself in the flag, how does that fit into your requirement? Particularly when you are saying with your definition of an unworthy use, there are plenty of Americans who believe that politicians wrapping themselves in the flag would be an unworthy use of the flag.

Mr. BARR. First, let me say that the constitutional amendment, the preamble language has to be interpreted against the language of the actual amendment itself. It is the language of the amendment itself that would appear in the Constitution. And as I say, the legislature would have the power under this amendment, which is the power they had prior to June 21—so this is nothing new—they would have the power to prohibit the physical desecration of the flag, which requires contemptuous contact with the flag.

Senator KENNEDY. Well, in the preamble that talks about physical desecration—at the top of page 2, you define that as including "displaying in a contemptuous manner." You cite the definition of desecration as "to be put to an unworthy use." That is pretty broad, I would think. There are a lot of people that think that the American flag that has been carried in battle should not be put on slippers, should not be worn as scarves, should not be made into bathing suits, that they have such honor for it in terms of the American history, and when they see people wearing these as bathing suits or displaying them as towels, beach towels, that that is certainly an unworthy action.

And I think you can probably find a lot of people who would think it was unworthy. Do you not?

Mr. BARR. Well, I am not sure whether it really matters whether people think it is unworthy. The issue is whether the legislatures, the people's representatives, want to prohibit certain kinds of physical desecration of the flag. As we say, desecration requires physical action toward the flag, on the flag, that a reasonable person would perceive as contemptuous.

These lines would have to be drawn by the State legislature or the Congress regardless of whether you went by constitutional amendment or a statute. Senator Biden's statute would prohibit people from wearing slippers with the imprint of the flag on it.

Senator **KENNEDY**. Well, the only point is this amendment would authorize the legislators to legislate in that particular way. Otherwise, I do not know what the words themselves and your understanding of the words in your testimony, what the rest of the meaning would be.

And it just seems that it just leads to the kinds of examples where they may say—and I would think there would be a lot of Americans who would feel that either political figures wrapping themselves in it or by using the American flag as towels or whatever kind of display, represented in this particular way is an unworthy and undignified use.

And given the language in both the article and the definition, I do not see how you would expect to preclude that from happening.

And I would think that that brings us into a very dangerous kind of position with regards to the American flag.

Let me, if I——

Mr. **BARR**. Well, Senator, could I respond to that.

Senator **KENNEDY**. Yes.

Mr. **BARR**. For over 100 years, the people's representatives have been making these decisions.

Senator **KENNEDY**. Not with regard to the first amendment.

Mr. **BARR**. There are 48 State statutes which prior to June 21 were presumably good law. Congress passed a law in 1968. Now, on June 21, all those laws were nullified. and prior to that time the people's representatives had prohibited contemptuous treatment of the flag.

All this constitutional amendment would do would be to restore that power to the people's representatives and set boundaries. And one of those boundaries are that they have to be protecting the flag, they have to be protecting the flag from physical desecration.

Senator **KENNEDY**. Well, not in the last 100 or 200 years has there been changes in that first amendment in this Constitution, Mr. Barr.

Let me ask you: In 1943 in *West Virginia* v. *Barnett* the Supreme Court held that no person could be required to salute the flag. President Bush made a major issue during the fall election of Governor Dukakis vetoing a bill that would have required teachers to salute the flag.

I was just wondering, since the President, Mr. Bush, feels so strongly about that kind of legislation, even though it would be unconstitutional, does the administration support a constitutional amendment to overturn that court case?

Mr. **BARR**. No.

Senator **KENNEDY**. Why not?

Mr. **BARR**. Well, because what we are trying to do with this constitutional amendment is to protect the symbolic value of the flag from people who are assaulting it. We are not attempting to force people to salute the flag or to necessarily to embrace the ideas it stands for. But we do not want people assaulting the flag as a symbol. They are two different things.

Senator KENNEDY. Well, obviously they are two different things. But we heard so much about it during the course of the campaign, every day during the course of the campaign, I just wanted to find out if he had a position with regard to that. He made a good deal of it in the course of the campaign. He obviously must believe in that very deeply because he talked about it so much. I was just wondering whether you wanted to have some adjustment made in terms of that particular position as well.

The CHAIRMAN. Mr. Chairman, I think we can work it out. I think we can do this. What we should do is, Mr. Barr, we will ask you to step aside for 10 to 15 minutes, and we will bring Judge Bork on. We will not have any time to question Judge Bork. We will submit the questions in writing.

Mr. Cooper, you are going to be on your own and not be on a panel as originally scheduled. I am, with all due respect, not going to move you up, OK, on this because we do not want to bump everybody.

So what we are going to do is extend everyone's prospects of being able to testify by 15 minutes.

I would ask unanimous consent that in order to accommodate Judge Bork, we will bring him on now because he has to leave here, let him testify. There will be no questions of Judge Bork. We will submit our questions in writing to Judge Bork. And we will then move on with the regular order.

Mr. Barr, you are very gracious. We will have you out of here in time for you to get out of the country and every one to make their planes, as I understand the schedules.

So if we can bring Judge Bork on now for his testimony. And again, there will be no questions, so that he is able to make his train. He and I spoke about it for a moment. I would like to accommodate all of you and him if I can. And his need seems the most urgent.

Senator THURMOND. Thank you, Mr. Chairman.

The CHAIRMAN. Happy to do it.

Judge Bork, welcome. You were unable to hear what I said, but the agreement is what we will do is you will testify, if you are willing, and we will refrain from questions and submit our questions to you in writing.

If you will take the center seat, Judge. Welcome. It is an honor to have you here. Please proceed with your testimony.

STATEMENT OF HON. ROBERT H. BORK, AMERICAN ENTERPRISE INSTITUTE

Judge BORK. Thank you, Mr. Chairman.

If there is any point, I would be willing to return in September to take any questions. But today my schedule did not work out too well.

I am pleased to testify at the invitation of this committee concerning the proposals to restore to Congress and the States the power to prevent the physical desecration of the American flag.

There is no need to begin with a tribute to the flag. Reverence for the flag is why we are here. But it is not merely that Americans revere the flag that makes this subject so important. If a multitude of individuals are also to be a community, they must have symbols by which they live, symbols that express their identity as a community. The United States is a large and increasingly diverse and pluralistic society. In that there is always the danger of divisiveness and fragmentation, which makes all the more crucial the preservation of the one symbol we share as an expression of our Nation and our community, the American flag.

Two solutions have been proposed. One is a statuted, the other is a constitutional amendment. If anything at all is to be accomplished, it must be by amendment. No statute will accomplish anything other than delay. The choice before you, I think, is not between a statute and an amendment. The choice before you is between accomplishing nothing and an amendment. If Chief Justice John Marshall's 1803 decision in *Marbury* v. *Madison* means anything, it means you may not overturn a decision like this by statute.

It is repeatedly said that we should not tamper with the Constitution. But the fact is that this amendment would not alter but would rather restore the first amendment to the Constitution. It is wholly unrealistic to suppose that every decision of the Supreme Court, no matter how wrong, represents the real Constitution. *Texas* v. *Johnson*, the flag burning decision, is a decision that probably no other Supreme Court in our history would have reached. Given that fact, the constitutional amendment before you would not tamper with the historic Constitution but merely with a decision that a switch in one vote would have caused to go the other way.

Johnson holds that flag burning is a mode of expression protected by the first amendment's guarantee of the freedom of speech. The majority's analysis, however, does not support that conclusion.

The first proposition relied upon by the five-Justice majority in *Johnson* was this:

> If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

The difficulty is that this bedrock principle had no application to the question before the Court. The Texas statute in question did not suppress any idea at all. Johnson's idea, if it deserves to be called that rather than a venting of spleen, was simply the hatred of the United States. He was and is entirely free to hate the United States and to express his hatred in a hundred ways other than by burning the flag.

In fact, he and his fellow demonstrators did just that by chanting "America, the red, white, and blue, we spit on you," while the flag burned. He was not prosecuted for that chant and no one suggests that he could be. The first amendment guarantees his freedom to speak in that manner. Under the Texas statute, Johnson was free to engage in any form of rhetoric about the flag and the Republic it represents, to use any form of insulting words or gestures he cared to. He was simply not free to desecrate the flag physically.

While the first amendment allows the expression of any opinion or emotion, it has never been interpreted to allow any and all means of expressing opinions or emotions. Even after the *Johnson* decision, one supposes, the Federal Government or a State government could punish such things as delivering a political message over television in obscenities, or expressing a political viewpoint from a sound truck at 2 o'clock in the morning in a residential neighborhood, or making a point by engaging in indecent public behavior. Yet if the rationale of the *Johnson* decision were consistently applied, none of these actions could be punished.

They are all powerful methods of expressing an attitude. Why does the first amendment allow them to be punished? Simply because the community finds them extremely offensive methods of making points that could be made in hundreds of other ways. Simply because putting out of bounds a few means of expressions like that in no way threatens the American system of freedom of speech.

We know that the physical desecration of the flag is like the use of obscenities or of indecent behavior to express an idea. We know that because of the wave of public outrage that followed the Supreme Court's decision in *Johnson*. We know that because 48 States and the United States had enacted laws prohibiting the physical desecration of the flag.

The other proposition upon which the Supreme Court majority rested fares no better. That proposition was the familiar slippery slope argument. But there was no slippery slope here.

The majority opinion stated:

> To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags, of copies of the Presidential seal, of the Constitution? In evaluating these choices under the first amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry in the very way that the first amendment forbids us to do.

That argument is wide of the mark. The Justices need not have consulted their own political preferences to decide that the flag is a unique symbol any more than they need to consult their own preferences to decide that the Government may punish expression through indecent behavior. The community's standards decide the question for the court in both instances, and there are objective means for determining those standards.

No other object even remotely resembles the flag as the symbol of our identity as a Nation. Forty-eight States and the United States have not enacted statutes prohibiting the burning of copies of the Constitution. Copies of the Constitution do not fly over public buildings and are not lowered to half mast when a national leader dies. Nobody salutes the Presidential seal. Nobody pledges allegiance to the Presidential seal. Marines did not fight their way across Iwo Jima and up Mount Suribachi to raise the President seal, a copy of the Constitution, or the flag of the State of New Jersey.

The American people have thus demonstrated through consistent conduct over many years that the flag of the United States is a symbol different from all others.

I have said that probably no previous Supreme Court majority in our history would have decided *Texas* v. *Johnson* as this Court did. Chief Justice Rehnquist's dissent notes that in the past Chief Justice Earl Warren and Justices Hugo Black and Abe Fortas all stated very forcefully that there was no first amendment problem with punishing the desecration of the flag. These were Justices who were very protective of free speech. And indeed, Hugo Black described himself as a first amendment absolutist. If those Justices would have empowered the United States and the States to prohibit the desecration of the flag, we need have no fear of doing so.

Now, I have heard it said in answer to that remark that first amendment doctrine has evolved since Chief Justice Warren and Justices Black and Fordas spoke. But if first amendment doctrine has evolved, that merely makes it all the plainer that we are not talking about the actual first amendment but about what the Supreme Court has done to the first amendment in quite recent years.

An amendment can bring us back to what the Constitution has always been understood to mean, but no statute can undo the harm caused by *Texas* v. *Johnson*. That is true for more than one reason.

First, the Supreme Court looks to the legislative history of statutes to see if they are attempts to accomplish what the Court's rulings prohibit. That means that the very fact we are sitting here today discussing this subject dooms any statute. At this very moment, we are making a record that the proposed statute is designed to evade the *Johnson* ruling, and that is enough to guarantee that the statute will be struck down.

Second, when an act is done for the purpose of expression, a statute forbidding that act will be upheld only if the Government can point to what the Court calls a compelling governmental interest. Well, what interest has the Government in preventing the public burning of the flag? Only an interest in preventing its desecration. And the Court has said in the *Johnson* decision that preventing desecration is not in its view a compelling interest.

Mr. Johnson, as you may know, has formed an emergency flag burning committee. He and others will defile the flag in 100 ways. When he burns his next flag, or does whatever else his perverse imagination may suggest, the Court will strike down any statute you pass, and we all will be right back here where we are today.

For that reason, I urge your favorable consideration of an amendment that would restore the rights of the American community without harming in the slightest the freedom of speech that is central to other all freedoms.

[The statement of Judge Bork follows:]

TESTIMONY OF ROBERT H. BORK[*]
BEFORE THE SENATE JUDICIARY COMMITTEE
CONCERNING STATUTORY AND CONSTITUTIONAL RESPONSES
TO THE SUPREME COURT DECISION IN TEXAS v. JOHNSON

August 1, 1989

I am pleased to testify at the invitation of this Committee concerning the proposals to restore to Congress and the States the power to prevent the physical desecration of the American flag.

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Two solutions have been proposed. One is a statute, the other a constitutional amendment. If anything at all is to be accomplished, it must be by amendment. No statute will accomplish anything other than delay. The choice before you is not between a statute and an amendment. The choice is between accomplishing nothing and an amendment. If Chief Justice John Marshall's 1803 decision in Marbury v. Madison means anything, it means you may not overturn a decision like this by statute. Only a constitutional amendment will be effective.

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[*] John M. Olin Scholar in Legal Studies, American Enterprise Institute for Public Policy Research.

It is repeatedly said that we should not tamper with the Constitution. But the fact is that the amendment would not alter but rather would restore the First Amendment to the Constitution. It is wholly unrealistic to suppose that every decision of the Supreme Court, no matter how wrong, represents the real Constitution. Texas v. Johnson is a decision that probably no other Supreme Court in our history would have reached. Given that fact, the constitutional amendment before you would "tamper" not with the historic Constitution but merely with a decision that a switch in just one vote would have caused to go the other way.

Johnson holds that flag burning is a mode of expression protected by the First Amendment's quarantee of the freedom of speech. The majority's analysis, however, does not support that conclusion.

The first proposition relied upon by the five-Justice majority in Johnson was: "If there is a bedrock principle underlying the First Amendment, it is that Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." The difficulty is that this "bedrock principle" had no application to the question before the Court. The Texas statute in question did not suppress any idea at all. Johnson's idea, if it deserves to be called an idea rather than a venting of spleen, was simply hatred of the United States. He was and is entirely free to hate the United States and to express his hatred in a hundred ways other than by burning the flag. In fact, he and his fellow demonstrators did express their hatred by chanting, "America, the red, white, and blue, we spit on you," while the flag burned. He was not prosecuted for that chant and no one suggests that he could be. The First Amendment guarantees his freedom to speak in that manner. Under the Texas statute, Johnson was free to engage in any form of rhetoric about the flag and the Republic it represents, to use any form of insulting words or gestures he cared to. He was simply not free to desecrate the flag physically.

While the First Amendment allows the expression of any opinion or emotion, it has never been interpreted to allow any and all means of expressing them. Even after the Johnson decision, one supposes, the federal government or a state government could punish such actions as delivering a political message over television in obscenities, or expressing a political viewpoint from a sound truck at two o'clock in the morning in a residential neighborhood, or making a point by engaging in indecent public behavior. Yet if the rationale of the Johnson decision were consistently applied, none of these actions could be prevented or punished.

Those are all powerful methods of expressing an attitude. Why does the First Amendment allow them to be punished? Simply because the community finds them extremely offensive methods of making points that could be made in hundreds of other ways. Simply because putting out-of-bounds a few means of expression in no way threatens the American system of freedom of speech.

We know that the physical desecration of the American flag is like the use of obscenities or of indecent behavior to express an idea. We know that because of the wave of public outrage that followed the Supreme Court's decision in Johnson. We know that because forty-eight States and the United States had enacted laws prohibiting the physical desecration of the flag.

The other proposition upon which the Supreme Court majority rested fares no better. That proposition was the familiar "slippery slope" argument. But there was no slippery slope here. The majority opinion stated:

> To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the Government, on this theory, prohibit the burning of state flags? Of copies of the

> Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.

This argument is wide of the mark. The Justices need not have consulted their own political preferences to decide that the flag is a unique symbol any more than they need consult their own preferences to decide that government may punish [illegible] indecent behavior. The community's standards decide the question for the Court in both instances, and there are objective means for determining those standards.

No other object even remotely resembles the flag as the symbol of our identity as a Nation. Forty-eight States and the United States have not enacted statutes prohibiting the burning of copies of the Constitution. Copies of the Constitution do not fly over public buildings and are not lowered to half-mast when a national leader dies. Nobody salutes the Presidential seal. Nobody pledges allegiance to the Presidential seal. Marines did not fight their way across Iwo Jima and up Mount Suribachi to raise the Presidential seal, a copy of the Constitution, or the flag of New Jersey. The American people have thus demonstrated through consistent conduct over many years that the flag of the United States is a symbol different from all others.

I have said that probably no previous Supreme Court majority would have decided Texas v. Johnson as this one did. Chief Justice Rehnquist's dissent notes that in the past Chief Justice Earl Warren and Justices Hugo Black and Abe Fortas all stated very forcefully that there was no First Amendment problem with punishing the desecration of the flag. Those were Justices who were very protective of free speech. Indeed, Hugo Black described himself as a First Amendment absolutist. If those Justices would have empowered the United States and the states to prohibit the desecration of the flag, we need have no fear of doing so.

An amendment can bring us back to what the Constitution has always been understood to mean, but no statute can undo the harm caused by Texas v. Johnson. That is true for more than one reason.

First, the Supreme Court looks to the legislative history of statutes to see if they are attempts to accomplish what the Court's rulings prohibit. That means that by the very fact of holding these hearings the statute proposed is doomed. At this very moment, we are making a record that the proposed statute is designed to evade the Johnson ruling, and that is enough to guarantee the statute will be struck down.

Second, when an act is done for the purpose of expression, a statute forbidding that act will be upheld only if the government can point to what the Court calls a "compelling governmental interest." What interest has the government in preventing the burning of the flag? Only an interest in preventing its desecration, and the Court said in the Johnson decision itself that preventing desecration is not a compelling interest. Mr. Johnson has formed an emergency flag burning committee. He and others will defile the flag in a hundred ways. When he burns his next flag, or does whatever else his perverse imagination may suggest, the courts will strike down any statute you pass, we will all be right back where we are today.

I urge your favorable consideration of an amendment that would restore the rights of the American community without harming in the slightest the freedom of speech that is central to all other freedoms.

Judge **Bork**. Mr. Chairman, I have a few minutes if you wish to ask questions, or I can leave and answer by written.

The **Chairman**. I think if we begin, I am not sure how we can end. By that I mean the questions raised, as you know, the issues raised, are profound. As I look at the clock and wonder how that can be done in 7 minutes.

But let me ask you, would you be willing to answer questions in writing if we submit them to you?

Judge **Bork**. Certainly.

The **Chairman**. I thank you very, very much for your appearance and your time and your interest.

Judge **Bork**. Thank you.

When this was originally scheduled, it looked as if I would be on at 10 o'clock in the morning. That is why I made a train reservation. Otherwise, I would be glad to stay.

The **Chairman**. Well, I apologize for that. Because we were not even going to begin until 10 o'clock. And as originally scheduled, as we told the minority and majority staff, that we would always, as we do, start off with any one on this committee, opening statements, and the administration.

And I apologize for your having been mislead.

Judge **Bork**. There is no occasion for an apology. I am merely explaining why I have to leave.

The **Chairman**. Yes. We understand.

Senator **Thurmond**. Judge Bork, I just want to say we are honored to have such an able jurist come and express himself on this vital question. Thank you very much for your appearance.

Judge **Bork**. Thank you very much, Senator.

The **Chairman**. Thank you very much.

[The questions of Judge Bork follow:]

Robert H. Bork

QUESTIONS FROM SENATOR BIDEN:

1. Under the Supreme Court's opinion in Texas v. Johnson, the Biden-Roth-Cohen bill would be found unconstitutional if used to prosecute a political protest flag burning case. If Johnson proves to be an "unstable" precedent -- i.e., if the Court does not follow it in the next case -- then, of course, a statute of the sort described might be upheld. But the rationale of Johnson, if it is followed, will invalidate any attempt to punish flag desecration where the act of desecration is intended to communicate a political opinion. My testimony assumed that the Supreme Court would follow its own precedent.

2. No. The amendment I supported also allows legislation protecting the flag from being displayed in a contemptuous manner.

3. Part A: There is no compelling or strong governmental interest other than suppression of expressive conduct in the intent behind the Biden-Roth-Cohen legislation. There was such a governmental interest unrelated to the suppression of expressive conduct in United States v. O'Brien, and that was the reason the statute in that case was upheld. Hence, O'Brien is not relevant in this discussion.

   Part B: O'Brien remains good law but, for the reason just given, it will not sustain the Biden-Roth-Cohen legislation.

QUESTIONS FROM SENATOR GRASSLEY:

1. The Supreme Court's answer to this question has varied over time. Currently, the Court requires that we tolerate beliefs of all types and allow those beliefs to ascend or fall of their own weight. The Court has not, however, usually compelled us to avoid regulation of offensive conduct, nor should it.

2. Conduct and overt acts, unlike speech, can and should be regulated. It is certainly not the case that all acts of disrespect, undisciplined behavior, and violence have to be tolerated. There remains a recognized difference between liberty and license, though it is no longer usually expressed in those terms.

3. What constitutes the "Flag of the United States" would be defined by the Congress and state legislatures in any statutes barring desecration passed under the authority granted by the amendment. Federal courts would then pass upon the question whether a definition was permissible. I am sure the amendment would not allow a state to make criminal the use of anything resembling a "flag" in any fashion.

4. That same criticism could be leveled against most of the most revered sections of the Constitution. That is the nature of constitutional language which allows for flexibility and the ability to age without becoming outdated. For example, the Court has debated for years exactly what is "freedom of speech" in the First Amendment. Does that term include such things as pornography? And what is pornography? What exactly encompasses "due process of Law" in the Fifth Amendment? What is "cruel and unusual punishments" in the Eighth Amendment? That is why we have a Supreme Court to define those terms and why we have an amendment process in the Constitution to give Congress and the people a way to check and modify rulings of the Supreme Court. That is fundamental to our democracy.

5. The proposed amendment would create an extremely narrow and limited exception from the First Amendment as that Amendment has been interpreted by the Supreme Court in Texas v. Johnson. The proposed amendment would in no way allow Congress or the states to prohibit the expression of sentiments like Johnson's by dozens of methods other than the desecration of the flag.

6. Except as mentioned in my answer to question 5, the proposed amendment would not limit any other provision of the Constitution.

7. The drafters of the proposed amendment at issue here may have had several policy reasons. One possible reason is to allow states the ability to pass legislation more in keeping with the particularized concerns of their residents. States as well as the federal government had and exercised the power to enact various flag-protection statutes before the decision in Texas v. Johnson. The amendment would simply restore the status quo ante.

8. No. As I have stated before, the amendment, as drafted, is extremely narrow in its reach. Any enforcement of statutes passed under authority of the amendment would still be subject to all other constitutional concerns, such as, the due process clause and the restriction against cruel and unusual punishments.

9. I think the analysis is incorrect. Texas v. Johnson holds that no statute could be applied to prevent the expressive burning of the flag.

10. As discussed in my testimony, the opinion makes it clear that the communicative aspects of Johnson's actions, not the text of the statute, provide the impetus for the First Amendment analysis. Without expressive conduct at issue the Texas law would not have been challenged under the First Amendment. As such, the only way for Congress to address the problem is with a constitutional amendment.

11. The analysis is flawed. There is no governmental interest of a compelling nature other than the suppression of offensive conduct. No interest is identified that would be sufficient to override the defendant's free speech interest, as the Johnson case defined that interest. Here the governmental interest-- to protect a national symbol from desecration -- was found by the Supreme Court in the Johnson case to be insufficient to overcome free speech concerns.

12. The intent of the amendment has been made plain by the drafters. The amendment is clearly in response to the Johnson case and, as I answered above, is not a limit on other constitutional rights. The additional language is unnecessary.

13. I do not agree. The constitutional amendment process was established by the Constitution to allow amendments to be made when the citizens of the United States see a compelling need. The original drafters of the Constitution also made the process difficult so that only amendments that command overwhelming public support will be enacted. It is significant that no one has even suggested an amendment that would allow the suppression of views like Mr. Johnson's although those views are certainly unpopular. If such an amendment were suggested, it would have no chance whatever of being proposed by Congress or ratified by three quarters of the states. The measured and thoughtful process by which the people adopt amendments will not change as a result of passage of this amendment.

14. The amendment would not allow government to prohibit expression because of disagreement with its message. It would allow the people to prohibit only one offensive method of expression. The Supreme Court allows the suppression of other offensive methods of expression so that the amendment would not introduce a new principle.

Until this year and the Supreme Court's decision in Johnson, few believed that First Amendment protection reached beyond speech to conduct such as Johnson's act of burning a flag. Second, the proposed amendment only places laws against desecration of the flag in the same position they were in for years prior to the Johnson decision. The First Amendment still commands a major role in constitutional jurisprudence, and speech is not made any less free by the proposed amendment with its narrow reach. If anything, the "moral legitimacy of the First Amendment" is undermined by extending its reach beyond speech to encompass offensive conduct most Americans feel is undeserving of protection and void of worth.

15. No. That is why I recommend to the Committee the proposed language proposed by the President, Senator Dole and Senator Dixon as a workable solution.

16. Certainly there would be less incentive were the press not to cover flag burnings. However, that ignores that most flag burnings are done to outrage and incite the average man on the street. Not all flag burnings are staged merely for the benefit of press coverage. The ideal of freedom is in no way threatened by the suggested amendment. Nobody has ever suggested that the ideal of freedom requires freedom to engage in any conduct whatever or even any conduct that is objected to solely on the grounds of its offensiveness.

The CHAIRMAN. Now, Mr. Barr, thank you also for being willing, as I said, to stand aside for a moment.

I yield to Senator Thurmond to ask Mr. Barr questions.

Senator THURMOND. Mr. Barr, some people have suggested that if the Government can protect eagles and monuments from desecration or destruction, that it can do so for the flag. Would you care to comment?

Mr. BARR. Yes. These are false analogies. Remember the basic structure of symbolic speech analysis. The issue is what is the Government's reason for the rule? If the Government's reason is related to expression, the Government loses. So the Government has to show some interest, some reason for its rule, that is unconnected with expression.

One interest the Government does have that is unconnected to expression is the conservation interest. The Government wants to protect certain things from physical destruction because they are inherently rare and irreplaceable. They are one of a kind or one of a few.

The reason we protect rain forests is not because of their symbolic value. It is because they are rare. The reason we protect bald eagles is because they are rare. Now, sometimes the Government's conservation interest—before I get to that, let me say, that is the reason we also protect historic buildings. That is another one that is thrown around. We protect historic buildings because they are one of a kind. If they are destroyed, that is it.

Now, the flag is inherently reproducible. We can protect the flag that flew over Fort McHenry or this flag that went up San Juan Hill because they are historic artifacts, one of a kind.

Now, sometimes the Government's conservation interest coexists with the symbolic nature of the article. For example, the Statue of Liberty is both unique, one of a kind, and it is symbolic. But the reason we protect it is because of our conservation interests. I could build an exact replica of the Statue of Liberty in my front yard and blow it up, and I have not violated any kind of government interest.

Senator THURMOND. Mr. Barr, are you familiar with Representative Brooks' proposal that was approved by the House Judiciary Committee?

Mr. BARR. Yes, I am, generally.

Senator THURMOND. Would you give us your view on that proposal?

Mr. BARR. There are several defects with the bill that was reported out of the House Judiciary Committee. First, we believe it is unconstitutional for the reasons we have set forth here, and that is that the reason is acting, the reason the Government is trying to protect the physical integrity of the flag, is because of its symbolic value, and therefore it is inherently related to expression. And for that reason, it will be struck down under exacting scrutiny.

Moreover, the bill is completely ineffectual. It deletes from its coverage the word "defile," thus permitting soiling of the flag. And then it provides an absolute defense for anyone who destroys a soiled flag. So anyone who wants to destroy the flag contemptuously can simply soil the flag first and then burn it. So the statute does not protect the flag.

Moreover, the statute is again over broad. It covers any kind of conduct with the flag, any kind of mutilation of the flag, or any kind of defacement of the flag, regardless of intent. And that means that it would prohibit such things as putting unit designations on the flag, and it would also prohibit making a movie that showed the flag mutilated, as numerous movies that you can go and rent today show the flag being destroyed.

Moreover, in order to soften the impact of its overbreadth, it limits protection only to official flags of the United States. Now, that means that it cuts back from what Congress has done in the past and it cuts back from what Senator Biden wants to do, because it would permit the desecration of depictions of the flag. So under the statute you could have a billboard or a mural with a swastika across it, and as long as it was not the actual flag, as long as it was a depiction, a perfect depiction, you could not prohibit that kind of conduct. Moreover, you could burn 48-star flags, 13-star flags. So it cuts substantially back from the protection that Congress thought was necessary in 1968.

Senator THURMOND. Are you familiar with a proposal of the distinguished Chairman of this committee, Senator Biden?

Mr. BARR. Yes, I am.

Senator THURMOND. Would you care to comment on that.

Mr. BARR. Well, most of my testimony actually focused on Senator Biden's proposal. And I pointed out——

Senator THURMOND. Just briefly. In other words, I will ask you this: Do you think Congressman Brooks' proposal, Senator Biden's proposal, or a proposal by anybody else in the form of a statute, would guarantee results?

Mr. BARR. No, it would not guarantee results. It would be unconstitutional and struck down as unconstitutional.

One of the flaws of the statutory approach, we have already described why we think it is unconstitutional, why we think it is over broad. Now, the premise of the statute is that it is neutral, that is the premise of the statute. But let us really take a look at that neutrality. It is not neutral.

Where did these verbs come from? Trample, deface, lay on the ground, burn, those are not things people do when they are using the flag in a positive way normally? Why have we not included other verbs in that prohibition? A purely neutral approach to the flag would say either everyone can use it or no one can use it. These verbs were picked for a reason. They are things that people commonly do to show disrespect, deface the flag, usually.

Now, the one thing is burn, because we can burn flags respectfully. And low and behold, we say now that there is an exception for respectful burning of the flag. There goes your neutrality.

Moreover, it said, well, we are really concerned about the physical integrity of the flag. Is that true? There are some things that are prohibited that have nothing to do with the physical integrity of the flag. And there are things that can devastate the physical integrity of the flag that are not covered.

For example, to maintain it on the ground, that does not necessarily hurt the physical integrity of the flag. Putting the flag in a high wind, if anyone has seen a flag really go in a high wind, now that affects the physical integrity of the flag.

Where is the physical integrity of the flag safest? On my living room floor under plexiglass, where it would be prohibited by this statute, or flying it on a skyscraper where it will be ripped into shreds in a few weeks. But the statute does not protect the physical integrity of the flag in a high wind. Why not? Because that is the kind of conduct we want to encourage. This is not neutral.

If we are really concerned with the physical integrity of the flag why are we prohibiting maintaining it on the ground and yet we carry it into battle and put it on ships where its physical integrity can be affected. We are not really interested purely in the physical integrity of the flag.

The reason we want to protect the flag is its symbolic value. Everyone has said that. It is no secret. It is on the record. No one has set forth any reason other than protecting the symbolic value of the flag to support a statute. We have not heard it from anyone.

And as long as that is the reason, protecting the symbolic value of the flag, the statute is dead on arrival.

Senator **THURMOND**. Now, Mr. Barr, I believe your opinion is in consonance with that of the Attorney General, the Honorable Dick Thornburgh, on this subject, is that right?

Mr. **BARR**. That is correct.

Senator **THURMOND**. And, Mr. Chairman, without objection, I would ask unanimous consent that a letter to me dated July 31, 1989, be placed in the record at this point.

[The July 31, 1989, letter to Senator Thurmond follows:]

Office of the Attorney General
Washington, D.C. 20530

July 31, 1989

The Honorable Strom Thurmond
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

The Committee on the Judiciary asked for the views of the Department of Justice on whether an amendment to the Constitution is necessary, or whether a statute would suffice, to protect the Flag of the United States from burning and other forms of desecration. The need to take action to protect the Flag is prompted by the Supreme Court's recent decision in *Texas* v. *Johnson*, 57 U.S.L.W. 4770 (June 21, 1989), that a State cannot punish a person who burns or otherwise desecrates the Flag to communicate a message.

The Department has carefully considered the question and determined for the reasons set forth in the Department's testimony before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee that any statute that prohibits desecration of the Flag to protect its symbolic value, which is the only reason that Congress would pass such a statute, would be unconstitutional. Consequently, we believe that the only way to ensure protection of the Flag is through a constitutional amendment. You have my assurance that the President and I would be the first to support a statute if we thought it could survive constitutional challenge.

We think it is plain that even a statute prohibiting all Flag desecration would be held unconstitutional under *Texas* v. *Johnson*. Under the decision, it is the government's *reason* for prohibiting Flag desecration--not whether the statute indiscriminately prohibits all destruction or damage to the Flag--that determines the constitutionality of the prohibition. The reason for prohibiting all Flag desecration is the same as for prohibiting only contemptuous desecration--protection of the symbolic value of the Flag. Thus, a statute that prohibits all physical destruction or defacement of the Flag to preserve the symbolic value of the Flag is as unconstitutional under the reasoning of *Texas* v. *Johnson* as one that prohibits only contemptuous desecration.

The President and I have endorsed the amendment proposed by Senators Dole and Dixon and Congressmen Michel and Montgomery. This amendment would restore to Congress and the States the power to prevent the physical desecration of the Flag that was taken away by the Supreme Court in Texas v. Johnson. In contrast to a statute, it would enable the Congress and the States to define and prohibit only the specific conduct necessary to preserving the Flag's symbolic value. This flexibility to prohibit only the contemptuous conduct that concerns the American people can only be secured with a constitutional amendment.

The President and I urge the Congress to move expeditiously to send this amendment to the States so that the people may decide whether they want their Flag protected.

Sincerely,

Dick Thornburgh
Attorney General

Senator **THURMOND**. I will agree he is not here, so I guess I will have to——

Mr. **BARR**. Senator Thurmond, there have been some snide remarks about the President's motivations in this. The President right after the decision was issued asked the Department of Justice, asked the Attorney General, to analyze the opinion to determine how we could best go about protecting the flag of the United States.

People have referred to the fact that there was a delay, and only after some time did the President come out and endorse an amendment. Well, it is true that the Department of Justice did engage in a painstaking analysis to determine whether this could be done by statute.

Senator **THURMOND**. In other words, they gave a study that looked into it, investigated it, and determined that a statute will not get results, that if we are going to get results it will take a constitutional amendment. Is that correct?

Mr. **BARR**. That is right, Senator. I personally reported that to the Attorney General and to the White House. And the next day the President supported the constitutional amendment.

Senator **THURMOND**. I guess that is all the questions I have.

The Senator from New Hampshire.

Senator **HUMPHREY**. Mr. Barr, I am wondering if we can define the scope of the problem which flag burning presents. According to the press, the Attorney General undertook a survey to determine how many persons were incarcerated under the Federal flag statute. Can you tell us what the report of that was, the conclusion?

Mr. **BARR**. As best as we can tell, or at least as I am informed, on June 21 there was one Federal prisoner in custody who had been prosecuted for desecration of the flag. And he was released on June 30.

Senator **HUMPHREY**. Why are there not more?

Mr. **BARR**. I do not know what the situation is in the states.

Senator **HUMPHREY**. But I am talking about under the federal statute, why are there not more?

Mr. **BARR**. Well, I guess there are a number of reasons. One is that for 100 years, we have had laws on the books making it criminal to desecrate the flag. When those laws are nullified and they are no longer that inhibition, it is hard to say what kind of problem it would be.

Another reason is, like any extremely offensive action or action that is essentially tabu in some respects, it is not that common an offense. But after all, we adopted a poll tax constitutional amendment when there were only two jurisdictions, two districts in the United States, that had a poll tax. I am sure you would not suggest that just because there was a small problem at the time, we should not have a constitutional amendment ensuring that there would be no poll tax.

Senator **HUMPHREY**. Well, that the poll tax existed in two jurisdictions, as you say, is not to say that it did not affect a great many people.

Mr. **BARR**. Well, if there was——

Senator HUMPHREY. I do not want to get sidetracked, if you do not mind. I am trying to really understand the Department's position.

Have there been many cases where the Department just decided not to prosecute? I mean is the fact that there was only one person incarcerated in recent times indicative, or have there been many cases where the Department just declined to prosecute?

Mr. BARR. I did not say that there was only one case in recent times. What I said was the survey done on June 21 revealed that there was still one Federal prisoner in custody. Now, there were other prosecutions in the past, some of which went through the court system. After all, in 1982, there was the *Kyme* case where someone was successfully prosecuted for burning the flag and was incarcerated, and the fourth circuit upheld Congress' statute and the Supreme Court denied certiorari. But after all, in 1968 it was sufficient enough problem for Congress to turn its attention to it and pass a statute.

Senator HUMPHREY. 1982, and apparently one in more recent times. Any others that you can point to in recent times?

Mr. BARR. Well, I did notice that right after the Court's opinion some pro-abortionist did burn the flag.

Senator HUMPHREY. Yes. Well, you can always expect a few people to capitalize on press interest while it is high. And the annulment of these statutes may have an adverse effect, you might be right. But it is too darn early to tell I think. And we should weight that if it happens and cross that bridge when we come to it.

I mean, if it did come to threaten the Republic, that would be a different story, no question about that. But I do not see it as a threat today, or it is not even on the radar scope as far as I can tell.

Mr. BARR. Well, I——

Senator HUMPHREY. Certainly the Department statistics would indicate the same thing.

Mr. BARR. Well, I disagree with that, Senator. I think that when conduct is wrong—as Judge Bork said, we live by symbols. And I believe it is right for the United States to have an unalloyed symbol, an inviolate symbol of the nation that draws us together.

I could not put it better than Senator Biden did in his testimony before the House Judiciary Committee. That is important. It is a compelling government interest. And just because offenses appear to be rare at that point does not mean there should not be laws against it.

Senator HUMPHREY. In any event, you oppose the statute unequivocally, is that correct? You think it just would not suffice? It would not work, it would be struck.

Mr. BARR. It is not only unconstitutional, it is over broad and the logic behind it would have a pernicious effect on the first amendment.

Senator HUMPHREY. Under either statutory remedy or constitutional amendment, it would remain for the Congress and the states to define "flag" and define "desecration," is that correct?

Mr. BARR. Define "flag" and "physical desecration."

Senator HUMPHREY. Physical desecration. Well, the amendment, as you know, is by design not very specific. It is quite general. In the preamble, I guess you would call it, it says: "Whereas physical desecration may include but is not limited to such acts as burning, mutilating, defacing, defiling or trampling on the flag, or displaying the flag in a contemptuous manner," et cetera. So clearly it is going to be for the legislatures to define what is left out of this rather general description. Because even the general description admits in the preamble that "desecration may include but is not limited to the acts described."

Let me establish this: is the administration supporting the Michel resolution?

Mr. BARR. In the Senate, I believe it is cosponsored by Senators Dole and Dixon.

Senator HUMPHREY. Yes, they are identical as far as I know. The administration has officially endorsed those?

Mr. BARR. That is correct.

Senator HUMPHREY. Under that, assuming that those resolutions were to become amendments to the Constitution, what recourse would a citizen have who felt aggrieved if, for example, a State legislature defined the flag as the likeness of a flag printed on paper. What recourse would someone have?

Mr. BARR. Well, that statute could be challenged on the ground that that definition was outside the scope of authority. We do not believe it would be. We believe that under the language of the constitutional amendment, the legislature could cover the official flag, objects that could reasonably be perceived as the flag, as well as representations or depictions of the flag.

Senator HUMPHREY. Reasonable in whose mind?

Mr. BARR. A reasonable person. That is a standard we have throughout the law. That is the standard Congress used in 1968, and it is a good standard.

Senator HUMPHREY. Well, what would the court or courts consult in resolving such a case? They would go back to the amendment obviously, and they would go back to the legislative history. I do not think in this history we are going to define "flag" conclusively. And I am certain we are not going to define "desecration" conclusively. So what would they draw on?

This amendment is general and vague and broad. And surely we are not going to define conclusively flag in this history.

Mr. BARR. What we are going through here is what we go through on every law. First we have some language that is being proposed as a constitutional amendment. In fact, it is more specific than many provisions in the Constitution. And partly through this process of testimony, and partly through the ratification process in the states, where the State legislatures say what the meaning of those words are, what they understand them to be, we give fuller content to the meaning of this language. And ultimately it has to be construed by the courts.

Before that, the legislatures have to make a determination as to what kinds of laws they are going to pass. They have been passing laws for over 100 years. And all the spector of not being able to drive from coast to coast because of lack of uniformity is just nonsense. Forty-eight States have had these laws on the books.

We are going back to the situation before June 21, which four Justices of the Supreme Court thought is consistent with the Constitution.

Senator HUMPHREY. The thrust of Judge Bork's testimony seemed to be that as long as other forms of expression are available to express the same idea, then the Government may proscribe that form or those forms which are offensive to majorities. Is that the point from which the administration is proceeding or what? What actually motivates this?

Mr. BARR. We are being very—a constitutional amendment, as I understand it, is a very up front approach to it. We make no bones about the fact that what we are trying to do is to protect the symbolic value of the flag.

Now, if in fact we are so worried about the physical integrity of the flag that we find unit inscriptions on the flag to be offensive, if we really find it offensive for people to be cremated with the flag, if that is the kind of thing that strikes at the soul of the Nation, why have we had no statutes in 200 years doing that, protecting against that kind of innocent conduct?

Well, we have not had those kinds of statutes, because that is not the kind of thing that strikes at the symbolic value of the flag. In fact, some of that kind of conduct strengthens the symbolic value of the flag.

Senator HUMPHREY. Are anyone's rights injured by this decision?

Mr. BARR. Excuse me?

Senator HUMPHREY. Are anyone's rights injured by this *Texas* v. *Johnson* decision?

Mr. BARR. I am not sure what you mean by rights. Obviously their constitutional rights are not violated.

Senator HUMPHREY. Beg your pardon?

Mr. BARR. Obviously their constitutional rights are not violated. The Supreme Court has said that it is constitutional to burn the flag as a form of political protest. I do not know what you mean by rights. I think the Nation does have a compelling interest in protecting the flag.

Senator HUMPHREY. Yes, I know, I understand that is your point of view. I do not necessarily dispute that.

But what I am asking is something else. There are various elements, various aspects and facets to this matter. And one about which I am now asking you is this: are the rights of any individual harmed by this decision?

Mr. BARR. I guess my question is what do you mean by rights? I think if you mean——

Senator HUMPHREY. You are an Assistant Attorney General, and you are asking me what I mean by rights?

Mr. BARR. Yes. Do you mean constitutional rights, you mean legal rights?

Senator HUMPHREY. I mean the rights that we believe under the Constitution and our body of law.

Mr. BARR. I would say that in this case the court had found that there were no constitutional rights or legal rights that were violated by the burning of the flag.

Senator HUMPHREY. But you are not answering my question. Are anyone's rights injured by this decision?

Mr. **Barr**. As I say, no constitutional or recognized legal rights are, which is exactly why we want to amend the Constitution, because we believe that the Government does have a legitimate and compelling interest in protecting the flag.

Senator **Humphrey**. But no one's rights are injured?

Mr. **Barr**. Well, in colloquial sense I believe the rights of the Nation are injured.

Senator **Humphrey**. No, I am talking about individuals.

Mr. **Barr**. Well, I believe individuals comprise the Nation. I believe they should have the right to fend against physical desecration of the flag of the United States.

Senator **Humphrey**. Thank you, Mr. Chairman.

The **Chairman**. Thank you very much.

Senator Specter.

Senator **Specter**. Thank you, Mr. Chairman. And thank you for yielding to me at this time, although the stage is not too crowded.

We have just taken our first break in the Hastings hearings, and I wanted to come over and participate in these hearings because they are very important ones.

Mr. Barr, I would like to discuss a couple of points with you in just a few minutes because I have to get back to the other hearings. But the first subject I would like to take up with you—and I am going to condense this because of the brevity of time that I have and you do as well—is the issue on the desirability of dealing with a statute as opposed to a constitutional amendment, in the first instance to see if the statute will pass muster. My sense is that there are good reasons to think that it will.

But before getting into the substance of what a statute might provide, I would refer you to the case of *Escambia County, Florida* v. *McMillan,* not that it is a very astounding case, but it is a modern statement by the Supreme Court of the United States in 1984, 466 U.S. 48, that the courts will not reach constitutional questions where they "may rest alternatively upon a statutory grounded decision."

Perhaps the most famous statement was the dissent of Justice Brandeis in *Ashwander* v. *Valley Authority* when he said, and this appears at page 347 of 297 U.S.:

> Thus if a case can be decided on either of two grounds, one involving a constitutional question, the other the question of statutory construction of general law, the court will decide only the latter.

And my question to you, assuming there is a reasonable chance, colorable chance of getting a statute by, is it not preferable as a matter of general principle of law to go after a statutory remedy as opposed to a constitutional remedy?

Mr. **Barr**. If we believed a statute was constitutional in the wake of the Supreme Court's decision, and if we believed that a reasonable statute could be fashioned then, yes, that would be the preferable way to go. We do not believe that a statute can pass constitutional muster and could be consistent with first amendment principles articulated by the Court. You cannot write a statute that could be sustained, in our view.

Moreover, the statute that is being presented here in our view is a very bad idea from the standpoint of policy because it is so over broad. It goes to the extreme limits of what would be authorized by a constitutional amendment. It does away with any kind of intent requirement or any kind of contemptuous intent requirement, which 48 State legislatures and Congress had previously required.

And it does it, in our view, as sort of a pretext to really get at the kind of conduct that people find objectionable.

Senator **Specter**. Well, you are talking about Senator Biden's statute, but there might be another statute besides Senator Biden's statute. He might not have a corner on the market.

Let me hypothesize——

The **Chairman**. I am flattered with the interest though.

Senator **Specter**. Pardon me?

The **Chairman**. I said I am flattered by the interest.

Senator **Specter**. I quoted Senator Biden very broadly. We were on the—which bill were we on, Senator Biden? Was it Friday afternoon, I commented to him yesterday, it was a quarter to 6 and I was rushing to the train. He always catches the 6 o'clock train. And there he was on television. And I knew he must have been doing something very important. I did not have the sound on. I never do when Senator Biden is on television.

We were just finishing up—what bill were we on, Senator Biden? But at any rate, he——

The **Chairman**. Next witness.

Senator **Specter**. That is better than next Senator.

But hypothesize if you will, for a moment, a different statute, one which is on my mind, which would say that if there is desecration of the flag and there is an intent to offend those who see it, intent to cause personal injury, pain and suffering, damage to individuals, and suppose you provide an affirmative defense for someone who says, well, it is political expression or it is artistic expression—we have a statute in Pennsylvania, for example, which prohibits someone from speaking in a way to harass someone, with intent to harass. You cannot call somebody up on the telephone and harass them, repeatedly call them, or you cannot call them names. And the general category is harassment. So you have a right to freedom of speech, but freedom of speech has its limits if it causes personal injury, defamation for example.

But suppose we could structure a statute along that line, Mr. Barr.

Mr. **Barr**. That statute would fall. The——

Senator **Specter**. Why?

Mr. **Barr**. The basic question the court asks in determining whether it is going to be subject to exacting scrutiny, in which case the Government needs a compelling interest, which it can almost never show, and lenient scrutiny is what the Government's reason for the rule is, and if the reason for the prohibition is related to expression or expressive content of the activity, then you are going to be subject to exacting scrutiny.

Now, therefore, the Government has to be able to point to some harm, some public harm, that does not flow from the expressive content.

Senator **Specter**. How about a private harm?

Mr. **Barr**. Excuse me?

Senator SPECTER. How about a private harm, like the statute on harassment?

Mr. BARR. OK, right. The public's purpose there is to protect private right. So for example, you can prohibit sound trucks regardless of whether they are actually speaking or whether they are blaring rock music, you can prohibit them after 10 p.m. because the Government's interest does not flow from the communicative content. It is the noise.

You can prohibit physical intimidation because that actually works injury on someone. So you can prosecute someone for physically intimidating, going up and threatening an individual.

Senator SPECTER. You can prosecute someone for verbal harassment?

Mr. BARR. When it reaches a certain level. But if the Government's interest merely is to avoid harassment or offense, that goes right to the content.

Senator SPECTER. Political offense, but not personal offense, not personal harassment.

Mr. BARR. Excuse me.

Senator SPECTER. The cases you speak about cannot limit speech or expressive conduct if some unpopular political view is expressed or someone hears something they do not like to hear. But if a matter of personal harassment, if it is repeated telephone calls and verbal statements over the telephone late at night, freedom of speech does not prohibit the state from categorizing that conduct as a crime. Does it?

Mr. BARR. No.

Senator SPECTER. Well, how about a statute——

Mr. BARR. Well, there is a difference. Let me give you an example. It is one thing for the Government to say you cannot go in to someone else's house and intrude into their domain and take their property if I have a flag over my mantle. It is one thing to say you cannot go in and use that other person's property and trespass on his rights to put a swastika on the flag. There the Government is protecting my legal rights as owner of the flag to do what I want to. And it is going to protect me so that my phone is not ringing in my house in the middle of the night.

But it is a big jump to go from there and to say that the Government has a right to tell someone else what they can do with their own flag. So the Government can prohibit someone from going and putting a swastika on my flag, it has a legitimate interest in doing that, protecting my rights, my property interest, and my expression interests.

But it does not have a right, under the Supreme Court's reasoning, to go and say to someone you cannot put a swastika on your own flag, because that is his own private right and interest and expression.

Senator SPECTER. Mr. Barr, let me change the subject a bit because of the brevity of time and explore with you a few moments the possibility that a slightly different statute might pass constitutional muster because of the public outcry about the decision in *Texas* v. *Johnson*.

There is a very interesting doctrine articulated by Justice Scalia in *Sanford* v. *Kentucky* involving the matter of the death penalty for juveniles. And Justice Scalia moves to a question of what is a "national consensus," as articulating a constitutional standard.

Now, it is obvious that there is a significant difference between what is a national consensus on cruel and unusual punishment. Under the 18th amendment there is the due process clause of the 14th amendment which would pick up the eighth amendment. But there is some analogy.

And I think there has been a very strong national consensus that flag desecration goes too far, that there are other ways, many, many, many other ways of freedom of speech and freedom of expression. Perhaps that is wrong, perhaps there cannot be too many ways.

But in terms of a national consensus, I think we have certainly seen one on this case based on my observations around Pennsylvania. Maybe it has lessened. But I think it is fair to say that there is a national consensus.

What effect do you think that might have on the Supreme Court when they get the next case, which is slightly different, perhaps just a little stronger?

Mr. BARR. I would not think it would have any effect. I think that the Justices were aware of the national consensus on the flag and the special feelings toward the flag. It was not the first time the issue was raised. Congress had passed a statute in 1968. The dissent pointed out that the surest indication of national consensus was the fact that 48 State legislatures have passed these statutes, and the dissent made the point about national consensus.

It was an agonizing decision obviously for some of the Justices to make. I think they made their cut. And I do not think that the fact that there is an outcry will affect change in constitutional principle in the area of the first amendment. I am not in favor of using brute force to roll over the Supreme Court when they have enunciated principles.

I do not think it is an apt analogy to the eighth amendment, because the constitutional standard is usual. And so there is a basis for consulting what is usual in society.

But in the first amendment area, the "bedrock principle," as has been said, is that unpopular views, views that do not enjoy consensus and support should nevertheless be protected.

Senator SPECTER. Well, I do not agree with you about the Court expecting the kind of a public response which it received here. But let me pass on to one final question.

And that is looking back at a couple of lines of cases from the past—and they could be may-sided, and I would be very interested in Professor Tribe's response to the national consensus issue and to this question, about what has appeared to be changes in Supreme Court rulings in the past in response to a very forceful public reaction.

I would go back to the thirties with the complex cases that faced the Supreme Court of the United States, and to the case of *West Coast Hotel Company* v. *Paris*, where Supreme Court Justice Owen Roberts is reputed to have made a shift in significant response to a public outcry with the famous quote that "a switch in time saved nine," referring to the Justices and the pork packing plant, or to another line of cases—and I would not expect you to be familiar with these. I have just been reviewing them myself in light of this thought.

But referring to Gunther's analysis of constitutional law, he refers to the decisions in *Watkins* and *Swenzey* back in the late forties, early fifties, together with hearings on subversion in *Yates* and *Konigsburg* which provoked considerable criticism and were frequently mentioned in congressional debates on the 1958 proposals to curtail the court's appellate jurisdiction.

Then he notes a comparison of *Barrenblatt* and *Uphas,* the Federal and State investigation cases of 1959 which follow. He poses the question: Can those decisions be explained as responses to the hostile congressional reaction?

Is there a basis for the allegations that the 1959 decisions were inconsistent with and marked a retreat from *Watkins* and *Swenzey,* the 1957 cases?

This question is somewhat similar to the national consensus cases. But do you think there is some significant likelihood that the Court might retreat from this decision in *Texas* v. *Johnson* in view of the public outcry?

Mr. BARR. In determining what is constitutional and living up to the oath that we all have to uphold the Constitution, I think we have an obligation to use constitutional principles and logic to get us from point A to point B. And if we can't get from point A to point B based on principled analysis, then I'm reluctant to say that because you might use brute force and intimidate an individual to change his vote, that that would permit us to override the principles that have been articulated by the Court as a sheer exercise in sort of an intimidation of one justice.

But if that was our game plan, if we really felt that the national consensus was sufficient and the outcry was sufficient to ram this thing through the Supreme Court once again, then I wouldn't go with a—then I would go with a statute we really want. I would go—if we think that the outcry has been sufficient to cow one of the five in the majority, I would pick out a rational statute, one that's really focused on what we want to accomplish and make no pretext about the fact that we're trying to bully one justice into changing his vote.

Senator SPECTER. Well, then you're picking a different statute, but you're implicitly accepting the thought that the court is influenced by public reaction.

Mr. BARR. Well, apparently in some context it is. I don't believe it would be in this context. My own view is that the statute—that a statutory approach that focuses on fighting words or on incitement to riot or on any of those theories would essentially provide no protection to the flag. The flag is a political symbol, and normally when it is desecrated, as part of first amendment protected activity, it's done as political expression. And none of the other statutory alternatives would provide any kind of protection. In other words, the protection afforded by these other statutory alternatives are far too narrow.

The statutory approach suggested by Senator Biden does provide protection, but we think it goes too broad, and it would be better to provide a constitutional amendment that would permit the legislatures to focus on the kind of conduct that is really offensive. And

Senator Biden has said, and I believe it's still his position, that he, in good faith, is attempting to find a way to short—you know, so we don't have to go through the long process of amending the Constitution and see if this can be done by statute, but as far as I am aware, is not suggesting this as a ploy to sidetrack the constitutional amendment. I believe he still has an open mind on that question.

Senator SPECTER. Thank you very much, Mr. Barr. The issues are complicated, and I have, perhaps, overly boiled them down because of the brevity of time here. And I'm not suggesting that the Supreme Court ought to yield to the public passion. I'm raising the considerations which have been raised over a long period of time about whether the Supreme Court follows the election returns, as Dooley said about 100 years ago. We've seen changes in the Supreme Court decisions on affirmative action. Law has been changed. Maybe that's more a result of the change in personnel as opposed to a change in feeling in the country.

But you have a very tight decision in *Texas* v. *Johnson*, a very close decision, obviously close for the Justices who wrote the opinion. It might not take a whole lot more to sway them. It might have a fine tuning of the statute, as Senator Biden has proposed it or as otherwise. And I wouldn't rule out a constitutional amendment either. But it seems to me if we could structure a statutory remedy as a principle matter, it is vastly preferable.

Thank you very much, Senator Biden.

The CHAIRMAN. You're welcome. Notwithstanding you never have the sound on, you're still welcome.

My problem is I like the Senator from Pennsylvania too much.

Senator SPECTER. It's reciprocal.

The CHAIRMAN. I have a number of questions, but since you're the only person who belongs to an outfit that's always going to be in town, I would ask you only one, and then ask you if you would be willing to come back in the second, third, or fourth hearing, depending on the scheduling, because there's much to pursue here, and you're an extremely articulate witness. I'm not being solicitous. You state your case extremely well, and I'd just like to speak to one—ask you one aspect of it.

The significant portion of your case against the statute—there's two major pieces. One piece I'd like to speak to, and that is that to attempt to protect the flag because of its symbolic value is in and of itself an acknowledgement that there is a communicative impact, that it is in and of itself designed to affect expression, that it is expressive, that it falls into the speech category. That puts it under what you define as category one under stricter scrutiny because merely by acknowledging it's symbolic, notwithstanding that the statute would say it would be neutral, the language of the statute would be neutral, notwithstanding that, the fact that this all would be taking place, to quote Judge Bork, who apparently shares your view, he said, in his statement he said that legislative history of my legislation—meaning Biden legislation to protect the flag—or any legislation on flag burning, for that matter, would, in his words, "reveal that it was designed to prevent the expression of an idea by desecrating the flag." He went on to say that if in fact the Supreme Court—all the Supreme Court would have to do is to look to the legislative history for evidence of this unconstitutional motivation. That what the unconstitutional motivation is the desire to prevent the expression of an idea.

What I want to ask you is this. In the free speech area, the Supreme Court—how can I shorten this? The Supreme Court has not in the past, in my view, and will not void a statute that's neutral on its face because legislative history shows that there is an unconstitutional motivation. That is the practice of the court in looking at a statute is not to look at, not to look at the legislative intent, the legislative history if the statute is neutral on its face.

And the statute you've acknowledge is neutral on its face.

Mr. **Barr**. Actually, Senator, when you were out of the room, I explained why it's not neutral on its face.

The **Chairman**. OK. Then, I'll read the record in the interest of time.

Mr. **Barr**. But, just to respond to that, I think you put your finger on the nub of our position, which is that when the Government's interest is to protect a symbol, then it's inherently related to expression.

The **Chairman**. Right.

Mr. **Barr**. We don't—maybe you should ask Professor Tribe about the extent to which you can inquire into motives of the legislature, because he has a chapter in his treatise saying, yes, you should look at the motivations of the legislature in the first amendment area, but put that aside.

The Government's interest in protecting the symbol can result in rules that not only are directed at people who are attempting to engage in expressive conduct——

The **Chairman**. But those who are not.

Mr. **Barr** [continuing]. But those who are not, because——

The **Chairman**. Now, I understand that. That's the second part of your argument, it seems to me.

The first part of your argument is that it's unconstitutional. The second part is that it's bad policy.

Mr. **Barr**. No. What I'm saying is, when you're dealing with a symbol, the fact that the Government is prohibiting—why is the Government even prohibiting people who are burning the flag or acting contemptuously toward the flag but without an intent? They have no intent to communicate an idea. But what is the Government's interest in addressing that? It is also linked to the symbolism.

You strengthen the symbolism by requiring certain conduct toward the flag. And I call your attention to the footnote in the *Johnson* opinion where it points out that the statute in *Johnson* did not depend upon an intent, and it said that someone who was just tired and dragging the flag through the mud, but did not intend any offense toward the flag, would still be subject to the statute.

The **Chairman**. Well, I really am anxious to debate that further with you. I'd like to submit some questions, writing and asking if you could come back.

One parting question. You say, for example, the analogy for protecting bald eagles. You protect bald eagles because they're rare. Would it be unconstitutional for the legislature to pass a bill saying even if we had 10 million bald eagles to protect bald eagles because they're a symbol of what America stands for?

Mr. **Barr**. The issue would be whether or not you could prosecute someone who was chopping the head off a bald eagle as a form of political protest.

The **Chairman**. Yes. That's the question I'm asking.

Mr. **Barr**. And then the issue would be whether the Government's interest in protecting wildlife from suffering was compelling.

The **Chairman**. How about if they just said they wanted to protect them, period? Not because they're rare, not because they're extinct, not because of anything, just because they want to protect them.

Mr. **Barr**. I would say that would be unconstitutional under the Supreme Court's current ruling.

The **Chairman**. OK. I appreciate very much your testimony.

Mr. **Barr**. Thank you.

[The questions of Mr. Barr follow:]

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

September 5, 1989

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your request of August 8, 1989, that I answer a few written questions from Senator Grassley as a result of the August 1 hearing on Flag desecration. I hope these answers will aid your committee in its important work on this issue.

1. How much tolerance do we show to those who -- if their views were to prevail -- would show us none?

Clearly, we should not tolerate acts of physical violence toward other persons or their property. It is equally clear that as a general rule we should not limit a person's right to expression except in the most unusual of situations. The First Amendment reflects our commitment to the preservation of a marketplace of ideas. However, we believe society has a compelling interest in preserving the Flag as a unique and unalloyed symbol of this Nation. In our view, prohibiting the physical desecration of the Flag would not place an appreciable burden on free speech. The Supreme Court itself has previously made clear that "the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places." Los Angeles City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984). And as Justice Rehnquist said in dissent in Texas v. Johnson, "flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others." While we believe that flag desecration, a mode of expression, should be prohibited, all citizens are and must remain free to speak freely their views of the government itself, regardless of their motives.

2. Let me ask you a question that a constituent of mine asked me: Do all acts of disrespect, undisciplined behavior, and violence have to be excused, accepted, or tolerated as a right of

personal freedom? Is there no longer a recognized difference between liberty and license?

There must be limits to what we tolerate in the name of freedom. Freedom is not absolute. Our entire set of criminal laws reflects the fact that we believe that for the sake of society at large, we must set certain limits on personal freedoms. Through its elected representatives, society determines what limits should be placed on individual freedoms. This is the essence of democracy.

3. Critics of using a Constitutional Amendment to protect the physical integrity of the Flag maintain that there is a problem with defining just exactly what is a "Flag of the United States". What is meant when the term "Flag of the United States" is used in the proposed amendment and what are the potential problems with determining what is a "Flag" under the language of the proposed amendment -- will the proposed amendment allow a state to criminalize the use of anything resembling a "Flag" in any fashion?

In short, we believe that Congress and the state legislatures would be empowered under the Amendment to define Flag. A broad interpretation was adopted by Congress in 1968 and may be found today in the existing Federal Flag desecration statute. Because Congress and many of the States had defined Flag in a broad fashion in their Flag desecration statutes, we believe it reasonable for the Amendment to enable Congress and the States to provide again the type of protection they provided prior to the Supreme Court's recent decision. My prepared statement explains more fully what the term "Flag of the United States" means as it is used in the proposed constitutional amendment.

4. Opponents of amending the Constitution to protect the Flag contend that the term "physical desecration" of the Flag is an ambiguous term that could encompass a wide array of displays that are a part of other lawful activity and whose meaning can only be divined by those foolish enough to attempt such a definition. How do you respond to the criticism of the proposed amendment that the term "Flag desecration" is hopelessly vague and that it could result in the prohibition of displays that are a part of other lawful activity?

It should be remembered that the proposed amendment does not itself prohibit anything. It merely empowers Congress and the States to define and prohibit acts of physical desecration. While my prepared statement explains more fully what the term "physical desecration" means, a few important points should be made. First, the requirement that the desecration be "physical" makes clear that there must be physical contact with the Flag. Thus, Congress and the States could not punish mere words or gestures. Second, "desecration" should be interpreted to reflect a common-sense understanding of the term, such as that found, for example, in Webster's dictionary, which defines "desecration" as "to treat irreverently or contemptuously often in a way that provokes outrage on the part of others." Such a definition makes plain that the proposed amendment would authorize only the prohibition of contact that an objective observer could reasonably perceive to be contemptuous. Thus, legislatures could not prohibit proper displays of the Flag merely because they believed the particular surroundings were unfitting. Finally, it should be remembered that if and when Congress and the States enact new desecration statutes, they will have to define with specificity the types of conduct they are prohibiting to ensure that the statutes are not unconstitutionally vague.

5. Some who are knowledgeable in constitutional law have correctly pointed out that amendments to the Constitution take precedence over the constitutional provisions on the same subject which precede them. What section or sections of the Constitution will be amended by the proposed amendment? Will the proposed amendment modify in some way the "Equal Protection" clause of the 14th amendment or any constitutional "due process" requirements?

The proposed amendment would not modify in any way the important rights and guarantees of the Fourteenth Amendment. It is important to understand that a Flag desecration statute could still be challenged on the ground that it is unconstitutionally vague, which is a Fourteenth Amendment claim. The Constitution must be read as a whole, and that includes the amendments later added to it. This amendment makes clear that the Government's interest in preserving the Flag as a symbol of this Nation is compelling, and that it is constitutionally derived. In Texas v. Johnson, the Court observed that there was nothing in the Constitution indicating that the Flag was special. This was important to the Court when it concluded that the government's interest in the Flag was insufficiently compelling to justify a prohibition on Flag desecration. Thus, while the Amendment will give extra weight to the government's interests in preserving the Flag, which will affect the balancing analysis of the First Amendment, it will not impact in any way Fourteenth Amendment doctrine.

6. Opponents of an amendment to protect the Flag maintain that if the Flag is indeed a national symbol, then it should have the same meaning throughout the country. Therefore, Congress should want to establish a uniform and national regulation that will protect the Flag, rather than allowing the states to enact various Flag-protection statutes themselves, as is permitted by the President's amendment. Please give your opinion regarding the policy behind allowing the states to enact different statutes to prevent the physical mistreatment of the Flag, as opposed to

the Congress having the sole power to preempt and regulate this issue?

Prior to Texas v. Johnson, 48 of the 50 states had statutes prohibiting various types of Flag desecration. We believe that this amendment is intended to undo the damage caused by the Court's decision, and to restore to Congress and the States the power they had been exercising for nearly a century. State legislatures are the legislative bodies closest to the people and have been historically responsible for the enactment of most criminal laws. It is only natural then that the States should again have the power to prohibit Flag desecration as they once did. I have indicated previously, however, that there are arguments for the suggestion that Congress alone should be responsible for determining what protection to provide the Nation's Flag. Whether Congress alone should possess this responsibility, however, is ultimately a policy decision for Congress to make.

7. In your opinion, do you believe that the President's amendment - according to some opponents of a constitutional amendment - "confers power of uncertain dimension on the 50 states and countless local governments"?

No, I do not. I believe the proposed Amendment is really quite narrow. It only empowers Congress and the States to take action in a very limited context. In fact, compared to most of the other constitutional provisions that confer power on the Government, this provision would be one of, if not the most narrow.

8. In his statement before the House Judiciary Subcommittee on Civil and Constitutional Rights, Duke University Law Professor Walter Dellinger said that the Supreme Court's decision in Texas v. Johnson "emphasizes that (Gregory) Johnson was convicted under a statute that made his criminality turn on the communicative impact of his message." Professor Dellinger continued "the court thus draws a distinction between (presumably valid) statutes that protect the physical integrity of the Flag by, for example, forbidding all burning, and those, like the Texas law, that impermissibly criminalize impairment of the Flag only when it is done to communicate a certain message or only when it has a particular communicative impact." What is your opinion of Professor Dellinger's analysis of the court's opinion in the Texas v. Johnson case?

As my prepared statement more fully explains, we are convinced that the single most important factor in determining the level of scrutiny is not the scope or the terms of the statute, but the government's reasons for the statute. A Flag desecration statute that protects the physical integrity of the Flag would be enacted for the same reason as any desecration statute: to preserve the symbolic value of the Flag. The Supreme Court would obviously recognize that, even if Congress drafted a statute that had absolutely no exceptions to the prohibitions. The Court, however, has now said that the preservation of the Flag's symbolic value is inherently related to expression and therefore is subject to exacting scrutiny. Using that scrutiny the Court would never uphold the application of such a statute to the kind of conduct Americans want punished. I do not believe Professor Dellinger could possibly disagree with me on this point; I do not believe he has suggested that a statute protecting the physical integrity of the Flag would be unrelated to preserving the Flag as a symbol.

9. If you do not agree with it in whole or in part, how do you assess this particular point in the decision, and how can the Congress best address the result of the decision?

The Texas statute was explicitly directed at the communicative impact of the conduct; it was not, however, the fact that it was directed at that conduct but that it reached that conduct that rendered the statute unconstitutional. I think that if Congress wants to put a stop to those who would physically desecrate the Flag, there is but one option--amend the Constitution. A statutory approach clearly will not protect the Flag, and I believe the American people, and most members of Congress want the Flag protected.

10. Professor Dellinger further testified that the court's opinion in the Johnson case appears to conclude that "the Government can prohibit and punish Flag Burning in all circumstances -- even Flag Burning done as part of a political protest -- as long as the Government has (a 'non-speech') interest that is unrelated to the message being conveyed" or "unrelated to the expression of ideas." Do you agree or is this a distinction without a difference and does this preclude the necessity for a constitutional amendment?

I disagree. As I stated above, the government's reason for the prohibition, not its scope, is the key to determining how it would fare in court. If it was possible to articulate an interest or reason that was wholly unrelated to expression, then a statute would work. The problem, though, is that any interest in protecting the Flag because of its symbolic value is necessarily related to expression. That was the central holding of Texas v. Johnson. Because the Flag is a symbol, and our interests are in protecting it as a symbol, a prohibition on Flag burning is necessarily related to expression, according to the Supreme Court.

11. Professor Dellinger continued "unless this proposed amendment is understood to override or trump the provisions of the Bill of Rights, it does nothing. This . . . is not what its

sponsors intend." Consequently, Professor Dellinger proposed adding the following to the proposed amendment to cure the problem he sees due to the amendment's lack of specificity as to what part of the Constitution it changes. He would add: "The power conferred upon Congress and the states by this provision shall not be subject to the constraints of the First Amendment guarantees of freedom of expression or freedom of the press." Do you think that -- like Professor Dellinger -- in the absence of such a change, the text of the amendment seems to suggest either that the amendment overrides none of the Bill Of Rights -- and therefore does nothing -- or that it trumps all of the Bill of Rights -- and therefore confers unlimited and unreviewable power with respect to the subject of the amendment?

As we have said previously, we do not interpret or understand the amendment to limit in any way the other rights and guarantees contained in the Bill of Rights. I do not think it is necessary, therefore, to add the phrase he has suggested. It is clear that this amendment is being proposed in response to the Court's decision in Texas v. Johnson and that it should be interpreted to restore to Congress and the states the power they had prior to the decision. It does this by making clear that the Government's interests in preserving the symbolic value of the Flag are compelling. Given the context of this Amendment's proposal and ratification, it would be irresponsible (not to mention inconceivable) for a court to interpret the narrow power conferred to be itself in conflict with the First Amendment. When understood in this way, I think it is quite plain that the proposed amendment would not override any of the Bill of Rights.

12. Professor Dellinger further testified that "adoption of the proposed amendment could set a dangerous precedent for frequent resort to the amendment process for the curtailment of the rights (of those considered to be) unpopular." In your opinion, do you agree with his assessment of this effort to modify the Supreme Court's Johnson decision?

No. On this logic, we would never have adopted the Fourteenth Amendment. It is hard to imagine any cause uniting more people than the Flag of the United States. Despite the virtually unanimous overwhelming sense of the American people that the Flag is worthy of protection, it is still difficult to get the Constitution amended to provide that protection. This demonstrates how truly difficult it is to amend the Constitution. This Amendment would not make it any easier for other proposals to be ratified. Future proposals will be as carefully scrutinized as this one. They, too, will succeed or fail on the basis of their own merits.

13. Finally, Professor Dellinger stated that he is of the opinion that the President's amendment may "undermine the moral legitimacy of the First Amendment" because for 200 years, the

American people have understood that we must maintain the fundamental principle that "the Government may not prohibit expression simply because it disagrees with its message." In your opinion, what would this proposed amendment do to the "moral legitimacy" of defending expression that offends many Americans as deeply as Flag Burning?

The "moral legitimacy" of the First Amendment will not be endangered in any respect. I suspect that if damage has been done to the moral legitimacy of the First Amendment it occurred when the Court decided that the First Amendment's guarantee of Free Speech included protection for burning the Flag. The American people do not understand why a guarantee of Free Speech should include a guarantee of freedom to burn the Flag. For 200 years the American people thought that Flag desecration could and should be punished. Very few people believed that the First Amendment indicated otherwise. It is illogical to suggest that a return to the status quo that existed prior to June 21, 1989, would undermine the moral legitimacy of the First Amendment.

14. Is there any statutory language that you could recommend to the committee that would remedy the Johnson decision?

No. If the Administration saw any way that a statute could be drafted that would remedy that decision, we would support it. Unfortunately, any careful analysis of the Court's decision confirms that a statute could not withstand constitutional challenge. We have a duty not to play games on an issue of this magnitude. The American people and the Congress should understand that only a constitutional amendment would remedy the decision.

15. Columnist James J. Kilpatrick concluded an opinion piece that appeared in the June 28th, 1989 Washington Post by saying:

> . . . I am consoled by the thought that the Flag itself, and the American ideals for which it stands, will survive the puny assaults of such contemptible maggots as Gregory Lee Johnson. In the wake of the court's opinion, presumably we will see more Flag Burnings, but these too will pass. If the Press will ignore such odious demonstrations, their point will be lost. Meanwhile our most cherished ideal -- the ideal of Freedom -- will be maintained."

Would you care to comment on Mr. Kilpatrick's statement on the effect of the court's Johnson decision on the ideal of Freedom and contrast that with the effect of the President's amendment on that same ideal?

I disagree with Mr. Kilpatrick's suggestion that Flag burning is essentially harmless. Even the majority opinion in Texas v. Johnson recognized that society has a legitimate interest in the Flag as a symbol. Senator Biden has expressed well how the preservation of the Flag as an unalloyed symbol helps unite a heterogeneous society. The Flag inspires emotional attachment to the values for which it stands. It rallies the spirit of this nation. If we permit the desecration of this unique symbol, these important societal interests are, in fact, injured.

William P. Barr

William P. Barr
Assistant Attorney General
Office of Legal Counsel

The CHAIRMAN. Our next witness—and the majority leader wants me on the phone at this moment, but while he's coming up, I will take the phone call, and then we will begin—is Laurence H. Tribe, the Tyler Professor of Constitutional Law, Harvard University, not a stranger to this committee, and always a welcome and instructive witness. Please come up.

STATEMENT OF LAURENCE H. TRIBE, TYLER PROFESSOR OF CONSTITUTIONAL LAW, HARVARD LAW SCHOOL

Professor TRIBE. Senator Humphrey, and may I say for the record it's a great honor to testify at the committee's invitation on the constitutional issues that are posed by the protection of the American flag, which is obviously a uniquely important symbol of our Republic, and of the freedoms for which it stands.

I must say before turning to any of what I had planned to say—and I assume, without objection, the prepared statement can be read into the record.

Before turning to anything I had planned to say, I do think it's worth pausing to note what a bizarre constitutional theory the administration advances here. A law, as I get their position, to protect bald eagles becomes unconstitutional as applied to someone whose reason for decapitating the eagle is political, unless we have a scarcity of eagles and we can invoke conservation. Not a word in any Supreme Court decision would support any view so extravagant.

The Court has repeatedly held that the power of Government to protect things, whether for sentimental or other reasons, whether because they're symbols, or something else, is in no way limited by the fact that someone who wants to violate that protection has politics in mind. But let me return to that in a few moments.

Let me say, just by way of introduction, that many people—including, I think, more than a few genuine patriots—see how flag burners like Gregory Lee Johnson dishonor our national emblem and say that's no reason for us to dishonor what that emblem represents. It is not, in Senator Humphrey's terms, a national crisis. And I think it may be important to recognize that it plays into the hands of the flag burners to hand them the trophy of a compromised Constitution.

I agree with Mr. Barr of the Department of Justice that in deciding the need for an amendment, you just don't count the number of episodes. But I do think that we have to recognize that the radical surgery of the first change in the Bill of Rights in the history of this country ought to require a compelling showing of necessity, which I do not think has been made.

Now, the committee has, of course, before it two measures, a simple Federal statute that would protect the physical integrity of the flag, and an amendment. It seems to distress the administration that someone might care enough about every American flag to want to protect the physical integrity of it. But that's a policy dispute and not a constitutional objection.

And then a proposed amendment, the one favored among others by the Bush administration, that would empower Congress and the States to prohibit flag desecration, which the amendment's preamble defines to include defiling or displaying the flag in a contemptuous manner.

Now, I think that throughout the hearing, there has been a fundamental mistake that I hope will not mislead this committee. The basic mistake is to see the statute and the empowering amendment as basically two paths to the same goal, the amendment just being somehow stronger and surer. It gives, in the words of Senator Thurmond, more assurance, a kind of insurance policy. Senator Hatch early today suggested, "look, if both of them are going to do the same thing, why make such a big deal of it? Why not go the whole hog and amend the Constitution?"

I think that there is a profound fallacy in that because the question is not how best to achieve a given goal. The question is what should the goal be? If the goal, in words that Senator Simpson used earlier, is a simple, speedy, less intrusive remedy, as he said it himself, "a statute appears designed to achieve it." If the goal is a simple, quick protection of the physical integrity of all American flags—and I don't mean former flags, like the remnants of what was run up at San Juan Hill, I mean flags, usable flags—if that's the goal, a statute is surely the most rapid and powerful medicine for solving that problem.

But if, instead—and it now becomes distressingly clear that this is the case for the administration—if, instead, the goal is to launch more prosecutions based on the attitudes and the ideas that are expressed by people when they handle the flag and in the way that they handle the flag, then I will be the first to admit a statute cannot achieve that goal. Because that goal is radically incompatible with a core first amendment principle.

An amendment might achieve that goal, but at an enormous cost to the Bill of Rights. I think it couldn't have been clearer in the chairman's questioning of Mr. Barr that in his definition—but for this it would be hard to see what the meaning of "desecration" in this statute would be—under his definition, if person A burns the flag and happens to be a veteran and says, "I hereby consecrate the flag to my fallen friends," and person B burns the same flag in exactly the same way, but he's a communist and he says, "burn Uncle Sam, burn," the point of this amendment is to make it possible for States and actually 14,000 local communities to put person B in jail, but to immunize person A.

I will be the first to admit that if that's what you want to do, if you want to censor the message and not protect the flag, you certainly need a constitutional amendment to do it.

But to put the issue in perspective, I want to address the claim made by many and advanced most centrally by Judge Bork, that the whole problem is not the first amendment, it's one bizarre, aberrant 5-to-4 decision delivered by the Supreme Court last June. All we have to do is correct that, minor surgery, pluck it out of the Constitution, and all will be fine.

As Mr. Barr put it, representing the administration, he just wants to turn the clock back to, I guess it was June 20 of this year, the day before that decision, as though that decision came from nowhere and was unpredictable.

The fact is, if you review all four of the flag desecration rulings in the Supreme Court over the past 20 years, including about 18 separate opinions by various justices, what you discover is something quite extraordinary, and something that the debate, thus far, I think has obscured. I submit to you that all of the Justices, all nine, in each of the four cases, decided on this subject from 1969 to 1989, have agreed on two fundamental propositions.

First, that the goal of protecting the physical integrity of flags or eagles, or anything else that has special significance to a people, is attainable under the Constitution as it now stands. Not one justice has ever expressed doubt about that.

Second, all of them have agreed that if the goal is to make it possible to punish people on the basis of the attitude or idea that they express through what they do ~~or~~ what they destroy, that goal is radically incompatible with the whole Bill of Rights.

And if you read these decisions carefully, not once, not in any of the dissents from these decisions reversing various convictions, not once is that questioned.

So why you might ask, why all the 5-to-4 decisions if the Justices are unanimous on these two basic propositions? I think if you read the cases closely, you discover that the Justices have disagreed about whether, on the facts of individual cases, and in light of the specific statutes involved, whether the particular defendants in those cases were, in fact, being prosecuted on account of the physical harm that they did to the flag, sewing it to their pants, or sticking something onto it, or burning it, or on account of the contemptuous views that they were expressing. And not surprisingly in a complicated case, reasonable judges can disagree about that.

It goes back to 1969 and the *Street* case when Jim Meredith was shot in Mississippi. Street was someone who revered his flag, but he said, "you know, if they won't protect civil rights workers, what's the damn flag worth?" And then he burned it, and he made a speech, and he was prosecuted under a New York law which made it a crime to mutilate or cast contempt on a U.S. flag by words or deeds. The Court reversed his conviction, not unanimously, but on the judgment of the majority that it was really because of his views that he was being prosecuted.

A few years later there was the case of *Smith* v. *Goguen*, where this guy sews a small flag to the seat of his pants.

It was a crime in Massachusetts to treat the flag contemptuously. He was convicted. The conviction was reversed. The majority said, it wasn't because of the needle and thread and the mess he made of the flag, it was the attitude, where he put it.

In *Spence* v. *Washington* in 1974, after the Cambodia incursion someone taped a removable peace symbol to a flag, in violation of a Washington law that said you cannot exhibit a flag with a symbol or figure attached. He was convicted. The conviction was reversed.

And again, despite what Mr. Barr says about *Spence* v. *Washington*, which I reread twice this morning, there isn't a word in there suggesting that just because the Government was trying to protect a symbol, you have strict scrutiny. No, what the Court said was there is no showing that the State here is trying to avoid physical harm to this important symbol. All they're trying to do, since that peace symbol was readily removable, is silence the peace movement. It's a suppression of speech. That's why the majority voted to reverse the conviction.

And *Texas* v. *Johnson*, far from a bolt from the blue, was an absolutely predictable extrapolation of these cases. That's why Charles Fried, the Solicitor General in the Reagan administration almost got himself fired when he refused to file an amicus brief on behalf of the United States supporting the Texas prosecution. He quite correctly predicted the conviction would probably be reversed.

What did the fellow do there? He burns a flag and he chants, "Red, white, and blue, we spit on you." And what does Texas do? Instead of prosecuting him for burning the flag, it prosecutes him for mistreating it in a way that he knows will seriously offend a likely observer.

You don't have to be an expert in constitutional law to know that there is a core principle in the Constitution. None of the justices have questioned it. You go out after the person's ideas and you run up against the first amendment. It's just wrong to say that decision was some strange aberration. It was absolutely predictable.

Although I don't fault the justices who dissented, because when you look closely at the records in these cases, it is often a close question exactly why the person was being prosecuted, what the Government's reason was. And because it's so close, the court does not divide ideologically on it.

A lot of people have noticed how Justices Scalia and Kennedy, hardly rabid, radical liberal justices, were with the majority in *Texas* v. *Johnson*, because Justices Scalia and Kennedy concluded that Gregory Lee Johnson was being prosecuted for the views he expressed.

And if you go down through the cases, quite often conservatives are with those who vote to reverse the conviction Harlan and Stewart back in the *Street* case in 1969. Powell and White voted to reverse the conviction in the case of the person who sewed the flag on his pants in 1974. Powell and Stewart voted to reverse the conviction with respect to the removable peace symbol.

And you often have liberals voting to uphold the conviction, because they read the record differently and they say, "no, he was prosecuted because of the physical harm he did to this important symbol." That's why Warren, Fortas, and Black dissented in *Street* v. *New York*. That's why Blackmun dissented in *Smith* v. *Goguen*, the case involving sewing the flag on the seat of the pants.

And when Justice Rehnquist dissents in these cases, as in the removable peace symbol case, and in *Texas* v. *Johnson*, he does not say, he does not say as the administration said today, and as Judge Bork said today, that under our Constitution we ought to allow these people to be prosecuted because of how contemptuously they've treated the flag. On the contrary, in his dissent in *Spence* v. *Washington*, Justice Rehnquist said the very opposite. He said, it's precisely because the law against affixing things to the flag does not single out people in any way because of how contemptuous they are, that I will vote to uphold this conviction. And he repeated the point in his most recent dissent in *Texas* v. *Johnson*, saying that he did not believe Mr. Johnson was being prosecuted for the message.

So, the message—speaking of a message—could hardly be clearer from all these cases. If you read them from a nonpartisan point of view, there is remarkable unanimity among the justices that the solution depends on how you define the problem. If the problem is to make sure that you can convict people for impairing the physical integrity of this important symbol, there's a simple way to do it. There are a lot of arguments against that way to do it; as a matter of policy, maybe it's not needed.

But it's just not true to say that you can extract from these decisions any doubt about the fact that if you just protect the physical integrity of flags or gravesites or churches or synagogues or bald eagles—any of a number of things that people value because of what they represent—you do not run afoul of the first amendment. But of course, if the problem is to authorize nonneutral prosecutions based on point of view, then you need an amendment.

The CHAIRMAN. Unless I misunderstood, isn't that what Mr. Barr's point was? Isn't that because the amendment wants to be able to generate a situation that will permit someone to be prosecuted because of the views they expressed?

Professor TRIBE. I'm afraid that's absolutely true, Senator. I mean, at first when I heard the administration's arguments unfolding, beginning with Attorney General Thornburgh's appearance on the David Brinkley Show, I was aghast and thought they can't mean it, they don't really want to be able to punish dissent. What bothers them about the burning of the flag is the same as what bothers me. It hurts to see it burn. It's a sentiment of sympathy, not of censorship. But lo and behold, it turns out that censorship is what they're after. And if censorship is what they're after, they sure do need an amendment.

But let's make no mistake about it, the amendment they'd get wouldn't turn the clock back to June 20. It would turn it back to 1789. It would turn it back to the days before we had a first amendment.

It is said by some that the first amendment has never been an absolute—there are exceptions. Sure, there are. But never in the history of the Court has the Court said there ought to be an exception for letting the Government go out after some character because it disagrees with the point of view that he expresses, or with his attitude—"you don't have a good attitude so we're going to punish you for burning the flag."

Indeed, one of the best examples was given in the seat of the pants case, the case involving the contemptuous treatment of the flag. The State that wanted to sustain that statute was forced to admit, during oral argument in the Supreme Court, that if you have two different people in the same rainstorm, one of them puts the flag over his head, with regret, to protect himself from the rain and he's coming from an "America: Love it or leave it" rally, they're not going to prosecute him. But the other guy is a radical, and he's coming away from a peace rally, and he's delighted to have the flag get wet as he uses it as an umbrella—that's contemptuous, and that will be prosecuted. The only difference between those two cases is the attitude and the view expressed.

That's why it seems to me profoundly wrong, Mr. Chairman, to say that the proposed statute that you are considering would be some kind of trick to get around what the justices have done over all these years, and that these very hearings—if one is to believe Judge Bork—somehow doom your statute by showing that you are trying to find some sneaky way of censoring messages.

As I understand your statute, what you're trying to do is remove the very feature that various Supreme Court majorities have repeatedly found constitutionally fatal about past flag desecration prosecutions. And despite the invocation of the very heavy artillery of *Marbury* v. *Madison* in Judge Bork's testimony, I see nothing in *Marbury* v. *Madison* that says that carefully removing a defect identified by the Supreme Court so that you render a statute constitutional somehow defies the Court's role in interpreting the Constitution.

On the contrary, it takes that role seriously. They've told us what's wrong. Let's fix it instead of engaging in Court-bashing or Constitution trashing.

Now, there is a serious argument, and I do want to spend a little time on it, that is made I think very articulately by Mr. Barr. I think it's dead wrong. The argument is, nonetheless, interesting and serious. He says:

> But wait, there's no way to make a flag protection law neutral because flags are symbols. The flag symbolizes America. Therefore, if you punish the flag destroyer, you're punishing anti-American sentiment, Q.E.D.

Not Q.E.D. It's just not necessarily so. I was amazed by one of his examples. He says in answer to the question—not about bald eagles, that one was amazing enough—but about a law against book burning. Do you remember, Mr. Chairman, the analysis? He said, books are valued for what they express. Therefore, a law against burning certain books is related to expression. Therefore, such a law is subject to the most severe form of judicial scrutiny, which means that it's "dead on arrival." Nonsense. That's never been the law of the Constitution.

The cases are legion which hold that Government may choose to protect symbols, expression, speech. You can protect a speaker from being subject to interruption and heckling. That doesn't mean that your particular antiheckling rules are subject to strict scrutiny. The fact that you're trying to protect something that is valued because of what it expresses does not mean that the reason you're trying to protect it is to suppress or censor the person who attacks it.

Sure, we protect churches and synagogues from desecration, partly because of what they express, the religious passion that they convey. But does it violate anything in the first amendment to make a special law with added punishment against church or synagogue desecration? Not at all, because although you're protecting symbols, you are not protecting them because you don't like the religious attitude of the desecrator. For all you know, the desecrator is out on a lark, and doesn't have any religious attitude, is expressing nothing.

Indeed, I would venture to say that most people are more saddened, more upset by the wanton flag burner who couldn't care less and is not trying to make a point than by the pathetic Gregory Lee Johnson who, as Senator Mathias said so eloquently, is to be pitied because he has no more articulate way of expressing himself, or thinks he has no more articulate way.

In fact, as I thought about it, I've come up with a whole series of Supreme Court cases in which the Court has held unanimously that you do not have some special first amendment level of scrutiny whenever the Government chooses to protect certain symbols or certain messages. The most recent case involved the Olympic symbol. In the case of *San Francisco Arts* v. *U.S. Olympic Committee,* Congress passed a law saying, "we think the Olympic symbol is special, so we want the U.S. Olympic Committee to have exclusive power to decide who may use it and how." There was disagreement in the Court over a separate issue, but all nine justices agreed that when Congress decides to protect the Olympic flag, all it has to do is be reasonable.

Now, you can't tell me that there is more power in Congress to protect the Olympic flag than the American flag. That's nonsense.

Or take another case a few years earlier, 1983, *Regan* v. *Taxation With Representation,* Congress likes veterans, for good reason. They've made sacrifices for the country. So it gives them a break in the Internal Revenue Code. It says that veterans, under the Internal Revenue Code, can engage in active political lobbying without losing their 501(c)(3) status, but other groups cannot. So we're going to prefer the speech of veterans as a matter of Federal law.

You are preferring a symbol, a message, a selected set of patriotic groups. And what do you think the U.S. Supreme Court did? What level of scrutiny did they use?

If you listen to Mr. Barr, it would have been "dead on arrival." Nine to nothing, including Brennan, including Marshall, it was upheld without strict scrutiny.

The Court said, "Hey, all we have to do is apply minimum rationality under the due process clause of the fifth amendment."

Come to think of it, if that were not the rule, then the very decision by the U.S. Government to print American flags, to make them, to display them around the Washington Monument, would be dead on arrival. You'd have to have strict scrutiny.

Why did they put only American flags and not give Chinese and Soviet flags equal time? It is related to expression. Nonsense. That is not what the law has ever been.

In fact, the Court has held repeatedly that when Government chooses to protect something because of what it expresses and what it represents—protect it, promote it, even subsidize it—that does not mean that the law is looked at through a suspicious kind of microscope. It is only if the Government is going out after the message being expressed by the person who attacks the bald eagle, the Olympic flag, the American flag, the synagogue or the church, that you get heightened scrutiny.

So I think, to be very candid with you, that some kind of thing—not a flag, but a cloak—has been pulled over a lot of people's eyes on this issue.

Texas v. *Johnson* is no aberration. The Court is unanimous on the basic principles. The only issue is how you apply them, and one of the basic principles is you can protect the physical integrity even of a symbolic object.

Now, I do want to add that I think a strong argument might be made for pushing constitutional law in a new direction, for saying maybe we shouldn't be able to put an icon, a national icon, up on a pedestal.

I am divided about that, myself, but you are sold quite a bill of goods if somebody tells you where the U.S. Supreme Court is now. It is not. It has said that you can protect special symbols and protect them without heightened scrutiny.

Now, the supposed reason that remains to support this amendment is Senator Thurmond's insurance policy. It removes doubts that might hang over the Government's ability to punish those who attack the flag. With all respect to the absent Senator, it does not do that.

As far as physical protection of the flag is concerned, I think it is demonstrable the amendment adds zip, zero, nothing. It just adds nothing to the power the Congress and the States already have.

With respect to the prosecution of the ideas and attitudes expressed by those who attack the flag, it does add something to government power. What is totally unclear, however, is how much it adds.

Mr. Barr has some theories about which kinds of things might not be properly called "desecration." When Senator Kennedy asks him about the politicians wrapping themselves in the flag, with physical contact, no less, I guess he is a little stymied. Mr. Barr does not know if that could be called desecration. Nobody knows.

The fact is that in the two cases in 1974 decided in this area by the Supreme Court, the "seat-of-the-pants" case, and the peace symbol case, all nine Justices—again including the current Chief Justice, Justice Rehnquist—agreed that making a conviction depend on whether a particular display is contemptuous or not would in many cases provide no ascertainable standard. No one could tell what was punishable and what was not.

And in those cases, the dissenters went out of their way to say that the person was convicted not for contempt but for mutilating the flag, in the first case, with needle and thread, by sewing it to his pants. That was Blackmun's theory. It was a stretch, perhaps, but that was his theory. Or for covering the flag with an alien object regardless of what your message is. That was the Rehnquist theory in the peace symbol case. And in his dissent this June, Justice Rehnquist, now Chief, repeated the rather puzzling nature, in his words, of making a crime out of "improper flag etiquette," which is exactly what this administration proposes to do.

So, how much would the proposed amendment authorize, by way of convictions that every Supreme Court Justice over the past 20 years would have said is incompatible with the Bill of Rights?

The true answer is, nobody knows. You would have to have a lot of test cases to decide. That is hardly certainty. And what it adds up to is the proposed constitutional amendment is little more than a blank check authorizing unspecified withdrawals from America's most precious heritage, the Bill of Rights. The case for that radical a measure has not even remotely been made, in my judgment.

I would be glad to answer questions.

[The statement of Professor Tribe follows:]

TESTIMONY OF LAURENCE H. TRIBE[*] BEFORE THE SENATE JUDICIARY COMMITTEE REGARDING STATUTORY AND CONSTITUTIONAL RESPONSES TO THE SUPREME COURT DECISION IN TEXAS v. JOHNSON

August 1, 1989

I am honored to testify at the Committee's invitation regarding both a proposed constitutional amendment to give Congress and the States "the power to prohibit the physical desecration of the flag of the United States," and the principal alternative -- a proposed statute that would use Congress's existing power to penalize anyone who "knowingly mutilates, defaces, burns, or tramples upon any flag of the United States."

I.

I begin from the proposition that brings all of us together: the American flag is a uniquely important symbol of our Republic and of the freedoms for which it stands -- freedoms for which many have given their lives. As Justice Holmes wrote, "We live by symbols." Like most of us, I regard the deliberate destruction of the American flag as a despicable act, entirely apart from any message anyone might intend to communicate by such an act. In fact, I would guess that most of us are more offended by the flag-burner who trashes that emblem of our national unity and diversity in a wanton or mean-spirited way, without having anything in particular to express, than by the flag-burner who has a hateful political message to convey and thinks burning the flag is a good way to make his point.

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II.

I am equally convinced that one of the most profound principles for which our flag stands -- a principle at the core of the First Amendment -- is that government must never prohibit verbal or symbolic expression simply because society detests the particular idea or emotion expressed, regardless of what physical act may accompany that expression.

No one doubts, for example, that government may punish people for deliberately destroying or defacing even their own U.S. currency; under the law now in effect it is irrelevant whether people who burn their money do so to protest capitalism, or to mock greed, or just as a lark. But in a society dedicated to freedom of speech, government must be given no authority to punish anyone on the basis of the disagreeable views that he or she might seek to convey through that act.

This bedrock principle fully explains -- and, I believe, amply justifies -- the Supreme Court's narrow and specific, although widely misunderstood, holding in Texas v. Johnson. The State of Texas based Gregory Lee Johnson's conviction not on the simple fact that he had deliberately destroyed a still usable American flag, but solely on the ground that he destroyed that flag to convey a view that would offend those who watched him. Thus Texas left Johnson entirely free to destroy the very same flag out of meanness, nastiness, or perversity -- provided only that he took care not to communicate an offensive message to any likely observer. The State focused neither on his physical act, nor on any physical violence he might immediately provoke, but on the offensiveness of the message his act was likely to communicate.

Under the First Amendment, punishment predicated on the actor's message is impermissible. And so, I believe, it should remain, in a Nation dedicated to the proposition that government may not penalize behavior solely on the basis that the ideas or feelings it expresses are hateful. No statute could successfully challenge this core principle. And, to the extent a constitutional amendment would be designed to overturn that principle, I believe such an amendment should be repudiated. To create that type of exception to the freedom of speech would desecrate the flag far more than simply standing by and honoring the Constitution while the Gregory Johnsons of the world angrily and foolishly burn their flags. That they dishonor our national emblem is no reason for us to dishonor what that emblem represents.

III.

It is a serious mistake, however, to suppose that the only two available alternatives are doing nothing and punishing expression. The Supreme Court's decision in Texas v. Johnson left no doubt about the power of government to prohibit flag burnings knowingly calculated to incite violence or to lead to a breach of the peace. In addition, the Supreme Court's decision strongly indicated that government may, in the Court's own words, "protect[] the physical integrity of the flag in all circumstances," so long as such protection is independent of whatever message a flag-destroyer happens to convey.

IV.

Some have suggested that any statutory alternative would be some sort of trick designed to get around the Supreme Court's ruling while still violating its essence, because the only reason government would ever want to ban the burning or mutilation of an American flag, even if the law were not explicitly directed at public burnings that express contempt, is that destroying a flag offends people as an attack on the values the flag embodies. Therefore, it is said, a ban on flag-burning must have a purpose forbidden by the First Amendment -- namely, to censor the expression of anti-American views. Thus, they conclude, the Supreme Court should see through the ploy and strike the statute down.

I understand this argument. In fact, I may have been the first to advance it when I did so a decade ago in my treatise, American Constitutional Law (1st ed. 1978). I developed the argument further in that book's 1988 second edition.

What I failed to consider then, and what many evidently fail to consider even now, is that government often bans conduct precisely because a majority finds such conduct deeply offensive or reprehensible in itself, without thereby intending to punish the offensive message that the conduct might or might not be meant to express.

We ban the desecration of gravesites, for example, primarily because most people think of such conduct as deeply offensive in itself, regardless of whether any particular act of grave desecration is meant to convey an offensive message, or is so interpreted by any particular observer. And the fact that we enact such a prohibition largely out of concern for what a grave symbolizes or represents does not transform the prohibition into one secretly based on the desire to suppress a message. True, al objects that are essentially symbols or emblems are inherently expressive, and are valued for what they express. But it just does not follow that government conserves and protects such objects solely, or even primarily, to censor, suppress, or punish whatever the destroyer of such objects might wish to express by such conduct.

The principle I have in mind is the same as the one which justifies especially harsh punishment for those who deface places of religious worship as opposed to places of business. Places of worship (even when not in use) are, of course, inherently expressive of religious values, and are cherished in large part because they express those values. But it simply does not follow that the decision to give such places special protection from all who would deface or mutilate them represents a desire to suppress, censor, or penalize whatever anti-religious message someone who defaces a church or synagogue might want to convey. Extra protection is given out of respect for what the religious temple means to many, not out of a desire to censor non-believers. That is why ordinary laws prohibiting the desecration of churches and synagogues violate nothing in the First Amendment.

A law to protect speakers from interruption or interference need not be based on any objection to the heckler's message, or even any agreement with the endangered speaker's message. So too there is a basic logical fallacy in assuming, based on the expressive nature of whatever object or emblem we choose to protect, that our reason for protecting it must be to silence or punish an offensive expression of views. The sentiment reflected in a law designed to protect a physical symbol may often be a sentiment of sympathy for what the symbol embodies and represents, not a sentiment of censorship of what the symbol-destroyer expresses. This proposition is perhaps least clear when the object being protected is nothing but a symbol or a representation. But an American flag, unlike a mere likeness of a flag, is not simply an abstract symbol; it is a symbolic object, one which unites in its physical being a universe of diverse meanings.

Whether or not one finds this a persuasive view, the relevant fact is that five Justices on the current Supreme Court (the four Johnson dissenters plus Justice Blackmun) are on record as having voted, either in Johnson or in prior opinions expressly endorsed in the Johnson majority opinion, that the First Amendment permits the conviction of flag-burners so long as the government does not make the mistake Texas made -- that is, so long as the government does not single anyone out for prosecution based on the views he or she meant to express. Moreover, Chief Justice Earl Warren, Justice Abe Fortas and Justice Hugo Black took exactly this position 20 years ago, and it seems most unlikely that Justices Kennedy and Scalia would find the First Amendment more of an obstacle than those jurists did.

At least seven current Justices thus seem poised to uphold a properly drawn state or federal statute. It therefore seems quite irresponsible to claim that such a statute would almost surely succumb to the same fate as the Texas law that the Supreme Court struck down as applied to Gregory Lee Johnson.

V.

Some have made the beguiling but simplistic argument that, since Texas v. Johnson is a constitutional ruling, it follows from Marbury v. Madison that it can be overturned only by a constitutional amendment. That truism is irrelevant here. To be sure, when some laws -- such as a law mandating official prayer at the start of each public school day -- are struck down as unconstitutional, merely reinstating those laws by statute cannot overcome the Supreme Court's constitutional ruling. And when an individual choice -- such as the choice to use birth control -- is held to be constitutionally protected from government interference, only a constitutional amendment can reverse that result.

But when the Supreme Court has found a specific and identifiable constitutional defect in a statute, whether as written or as applied to a particular case, it obviously takes nothing more than a new statute lacking that defect to overcome the effect of the Court's decision. Thus, for example, a law requiring prayer in public schools may be salvaged by a law such as the one Congress recently enacted, and I supported, mandating equal access for religious and non-religious student groups. Carefully removing a statutory defect identified by the Court in no way overrules or defies the Supreme Court's constitutional determination or usurps the Court's role as constitutional arbiter; it badly misleads the public to suggest the contrary.

VI.

Having said this much, I should add that there may well be an important constitutional principle that ought to prevent Congress from passing even a neutral flag-protecting statute such as Senator Biden's. Perhaps the Constitution should be interpreted to mean that no emblem of the Nation may ever be placed on a sacrosanct pedestal; that we should permit no doctrine of "civil blasphemy" in this country; and that we should therefore tolerate even flag burning provided no other law (such as a law against theft, arson, or incitement to riot) is violated by the burner.

If constitutional interpretation had unfolded as I would have wished, such a norm might well be the governing one by now. It may well be that the Constitution should be construed to include a "political anti-establishment" principle -- one that would prohibit government from establishing any national symbol as too sacred to deface or defile. But my willingness to embrace such a principle has little or nothing to do with what the current United States Supreme Court would hold if presented with the sort of statute this Committee is now considering.

The question that I believe should be decisive as the Committee considers the supposed need for a constitutional amendment is not how I, or any other witness, might think the Constitution ought to be interpreted as an ideal matter. The decisive question in this context is, rather, how the Supreme Court we actually have would in fact be likely to interpret the Constitution. And, on that question, my analysis of the positions of the nine sitting Justices convinces me that the Constitution, without any amendment, would in all likelihood be interpreted to uphold the statute that is now before this Committee.

VII.

If the statute would survive judicial review without amending the Constitution, why amend it?

Some have replied by advancing the argument that, just to be safe (to avoid uncertainty and to forestall protracted litigation), the Constitution should be amended so as to make it unmistakably clear that Congress and the States are free, despite the Bill of Rights, to protect the flag from physical desecration -- as free as they were before the Johnson decision was handed down on June 21, 1989. But saying in so many words that Congress and the States shall have the affirmative "power to prohibit the physical desecration of the flag" provides no answer whatever to the crucial question: In subjecting such power to scrutiny under the Bill of Rights, how far would the Supreme Court allow the Federal Government or the States to go in writing, and then enforcing, specific flag-protection laws?

The crucial fact is that the proposed constitutional amendment, which merely affirms a sphere of positive lawmaking authority, is completely silent on just how much of the Bill of Rights the amendment is designed to override. If, as seems clear, the Bush Amendment is meant at least to overturn the specific holding in Texas v. Johnson, does that mean, for example, that the amendment would permit Congress, the fifty states, or the 14,000 municipalities, to enact dress codes identifying permissibly patriotic and impermissibly contemptuous ways of physically wearing or carrying representations of the American flag? May a state, under the Bush Amendment, say "no" to the seat of the pants, "yes" to the scarf, and "maybe" to T-shirts? How about flying the flag upside-down in political protest? Or taping to a flag a removable, paper peace symbol? The Supreme Court long ago held these acts to be protected. Yet many proponents of the Bush Amendment say that their amendment would authorize prohibitions of these very acts -- even while saying that their amendment would merely return the law to where it stood the day before Texas v. Johnson was decided. Which is it?

Only a series of lawsuits could answer questions of this sort. Ratifying the proposed amendment would do nothing but invite the very kind of litigation and uncertainty that the proponents of the amendment say that the amendment would avoid.

VIII.

Each statute that has been proposed as an alternative to the Bush Amendment may prove to have shortcomings; perhaps specific provision should be made for the disposal of worn-out flags, for example. But whatever the flaws of any particular statute may prove to be, those flaws may be rapidly repaired by passing corrective legislation. And if, in calmer times, the country chooses simply to repeal a flag-protecting statute, that too may be done quickly.

A constitutional amendment, in contrast, would be a far more permanent fixture in the legal and political firmament. Calling back or correcting such an amendment once it had been sent forth into history would be a monumental task.

For this reason among others, I would hope all of us could agree that constitutional amendments -- especially amendments affecting the Bill of Rights -- should not be approved when, as here, a simple statute, capable of being easily and quickly enacted, would suffice.

We do not honor the American flag by defacing the Bill of Rights, on its 200th birthday, with an amendment that is not only unnecessary but utterly incapable of resolving the uncertainty that is said to justify it.

The **Chairman**. Thank you very much, Professor.

Let me ask you two questions. I am not asking you to write such an amendment, but I am asking you to respond to whether there could be written such an amendment.

Is it possible to write a constitutional amendment that was specific enough to protect the physical integrity of the flag, with noted exceptions such as the "proper etiquette for destroying a tattered, burned or whatever flag" and not go after the views which are expressed when such destruction occurred?

Professor **Tribe**. I think, Mr. Chairman, that it could be done if the amendment were self-executing and as specific as your statute. That is, if the amendment said something like, "whoever knowingly mutilates, defaces, burns, tramples upon any flag shall be punishable." That is, if you really wrote it in as a law the way Prohibition, in effect, was. Not just empowering. That would do it.

Or, I suppose you could say, "Congress shall have the authority to punish anyone who knowingly mutilates or tramples upon, or destroys any flag of the United States."

But the point is once you did that, you would have added nothing to the power that Government already has. The only question is, how much did the Bill of Rights withdraw from that affirmative power?

The Court has repeatedly said—unanimously, as a matter of principle, and divided only on application to particular facts—what it withdraws is the power to censor. And that is exactly what it seems to me that the currently pending amendments want to add.

And the only question is, how much power to censor? Where would they stop?

The **Chairman**. The reason why I drafted the statute, and I have no pride in authorship, I am anxious, and prepared, and have already accepted suggestions from scholars like yourself—conservative, moderate, liberal scholars. And this issue is interesting, is it not—how it is all over the board in terms of how we characterize people.

Here we put two new Justices on the Court in the name of protecting traditional values, and they provide the majority to allow the flag to be burned under the Texas statute.

I am not criticizing that. I just want to make the point here that you have—and again I am not being facetious when I say this—you have Senator Humphrey and Senator Metzenbaum agreeing. You have conservative commentators, like George Will, and liberal commentators agreeing. So, this does not fall into a category of Republican, Democrat, liberal, conservative. It does not lend itself to that.

My purpose in drafting the statute was, first, to protect the physical integrity of the flag, and second, not in any way impede speech.

And the reason I ask you the second question that I did, about could there be a constitutional amendment that accomplished that purpose? I think there could be. I do not want one, because I do not think it is necessary, unless it proves to be necessary by a statute being declared unconstitutional.

What I am very concerned about, the more I have gotten into this—and I am not the scholar that either you or Mr. Barr, or any of our witnesses are today, on the first amendment—but the more I get into this, what I find disturbing about the particular amendment that has been proposed is one of the objects seems to be to get folks who say bad things about America, to get folks who express views that the vast majority of Americans find repulsive.

But we have never in the past attempted to "get." That is what, as the more I get into this, the more I have read, and what I have heard today—when I say, the more I have read, the more I have read of the statements, of the testimony of folks like yourself, as a matter of fact, before the House Judiciary Committee—I am growing a little bit concerned because one of the criticisms of my statute was by, if you read the testimony in full of Judge Bork, and read the testimony in full of Mr. Barr, and to some extent and he is an incredibly articulate fellow, he will speak for himself—by Mr. Cooper, is that "Well, Biden doesn't do, because Biden doesn't get the bad guys."

Professor TRIBE. Or he gets too many good guys along with the bad guys.

The CHAIRMAN. Or he gets the good guys along with the bad guys.

Professor TRIBE. It is intriguing. I mean, I guess my sense is that initially the national reaction against *Texas* v. *Johnson* resulted from some misunderstanding of what the Court had held. It is as though the Court had announced, "There is no way to protect the flag, folks. No way."

And people said, "Nonsense, there ought to be a way."

By the time they read the decision, I think a lot of people were more or less committed to coming up with an amendment, but the only kind of amendment you could show you needed was one that went a lot further than people, I think, in their calmer moments would really want to go.

The CHAIRMAN. Yes.

Well, I just want to make it clear that I am anxious to accomplish my goal, even if that means amending my bill, changing it in a wholesale way, if need be. And my goal is, to, A, protect the flag and, B, not impede speech, no matter how reprehensible, no matter how offensive, no matter how out of line with the views of the American people that speech may be.

I do not like the idea "Red, White, and Blue," and, you know, whatever the rest of the phrase was. And I have heard other phrases I do not want to repeat. I do not like it. My goodness, it scares the living devil out of me if one of the objectives that we have in an amendment is, in fact, to specifically limit the first amendment, not protect the flag.

Professor TRIBE. Mr. Chairman, I have at least one modest theory about how we have come to this, and it was suggested to me by something in Mr. Cooper's prepared testimony, and some of the things we have heard already.

That is, they recognize that there are certain instances, like the disposal of a completely worn-out and useless flag, that ought to be exempt. And then they assume that the only way to exempt those instances is through creating some viewpoint-based exception like a ceremonial disposition of the flag.

But, of course, you do not have to focus on viewpoint. You can just say, a former flag, a flag that can no longer fly is no longer a subject to this protection. It can be routinely disposed of. You can do all kinds of things like that with a statute.

You do not have to make a distinction between patriotic disposition and unpatriotic disposition.

Then, in the course of thinking about it, they come up with some admittedly clever examples: What about the movie, the flag that is burning in the movie?

Well, my goodness, it does not take a Steven Spielberg or a George Lucas to achieve that with special effects. If you really care about the flag, why should you say that because Warner Bros. or MGM is going to make more profit that they have to be able to use a real flag?

And then they say, well, some people want to be buried with their flags. They want to take it with them, in effect. Well, that is a tradition of sorts. But I really find it very hard to believe that a veteran who really cares about the country, and who has to sacrifice the right to burn the flag when he is cremated, would find that too much of a sacrifice to make, in order to have a neutral law, a neutral law that does not distinguish between the veteran who wants to be cremated with his flag and the Communist who wants to be cremated with his flag.

So, it seems to me that by conjuring certain extreme instances of cases where they are worried that a neutral law might go a little too far, and by exaggerating the nature of the exception that would have to be made for flag disposal, the proponents of an amendment work themselves into a posture where they are advocating what not Justice Rehnquist, not any of the conservative Justices on the Court have ever said we ought to be able to do: Censoring the viewpoint being expressed through a particular act.

I think that we should, with all the power available to us, resist an amendment to the Constitution that would do that, because that would not be just a small excision from the Bill of Rights. That would rip the heart out of the first amendment.

The CHAIRMAN. I quite frankly cannot imagine that a veteran, or a veterans' organization representing some of the most obvious examples of demonstrable patriotism being unwilling to change the handbook to accommodate protecting the flag.

Professor TRIBE. I find that hard to imagine, too.

The CHAIRMAN. I find that kind of—but anyway, that is a little off, it is a lot off the legal aspects of this issue. It goes more fundamentally to what people are willing to do and not to do.

Again, as usual, I have many other questions, but I am now going beyond the time that I should.

Let me yield to my colleague from New Hampshire for questions.

Senator HUMPHREY. Thank you, Mr. Chairman.

Your testimony, Professor, has been very interesting.

Let's suppose that the Biden bill is enacted, and so now we have a Federal law that says, "whoever knowingly mutilates," and so on, "shall be fined not more" and "imprisoned not more."

Supposing some guy says, "Well, I don't like the United States and I don't like the flag for which it stands, and I'm going to protest, I'm going to dramatize my dislike by burning the flag." And he does it, and he gets arrested under this statute. And he defends himself in court by saying, "This law is a violation of my first amendment rights." How could the law stand?

Professor TRIBE. People can argue, and often do argue frivolous constitutional claims. That one would not be quite frivolous, because I understand you can make the argument.

But what I have tried to explain in my testimony is that the Court has repeatedly said, and all of the Justices seem to have agreed, that when there is an independent justification for a law unrelated to suppressing his message, the fact that he violates it in order to make a point is no defense.

The Court in the *Texas* v. *Johnson* opinion went out of its way to say that Texas had not provided protection for the physical integrity of the flag in all cases. It also went out of its way to say that if he had been prosecuted for arson, or for theft, or for any of a number of other things he might have done, it would have been no defense.

Senator HUMPHREY. Right. Indeed, those laws still stand.

Professor TRIBE. And so here too—well, the Court did not strike down all laws protecting the physical integrity of the flag.

Senator HUMPHREY. Right.

Professor TRIBE. It struck down, as applied to this fellow, the law which made his guilt turn on whether he was likely to seriously offend those who observed him.

Senator HUMPHREY. Well, you seem to be saying that the courts will and indeed have carved out certain exceptions to the first amendment in order to protect symbols.

Is that what you are saying?

Professor TRIBE. Senator Humphrey, it is not so much exceptions to the first amendment as it is the recognition that the first amendment's central value is not implicated.

When the law does not take aim at the expression of the law violator—the fact that what it protects is a book rather than a bush or an eagle—it does not make any difference. The power of government to protect symbols is broad.

Senator HUMPHREY. Yes.

Professor TRIBE. OK——

Senator HUMPHREY. Go ahead.

Professor TRIBE. I was only going to say that when it becomes only a symbol, only an abstract symbol, the case becomes a harder one, but as many Justices have said in the course of these decisions, the flag is not only a symbol. It is not only a piece of red, white, and blue cloth, and it is not only only a symbol; it is a unique amalgam.

And the fact that we revere it because of what it expresses does not diminish our ability to protect it as long as we do not do so in a way that singles out the message of whoever threatens it.

Senator HUMPHREY. Well, getting back to my question, because I have a hard time resolving this—my question was: when the Court makes allowances for the protection of symbols, in effect, whether it addresses the matter or not, in effect, it is carving out an exception to the first amendment.

Professor TRIBE. In a sense, that is right.

Senator HUMPHREY. Effectively speaking, even though the subject is never raised.

Professor **Tribe**. Yes. If the first amendment had ever been read in a very absolute way, meaning if you do something to make a point, you have a defense. Rob a bank in order to protest capitalism, you have a defense.

You could say that——

Senator **Humphrey**. No, that is a different thing, though. You are injuring someone's property, many people.

Professor **Tribe**. Well, again—you say, it is a different thing, but you could also say it is an exception to the first amendment.

My own view is the central value of the first amendment is not implicated unless the Government is taking aim at someone's expression and his message. The fact that what he is doing may be expressive is not enough.

Senator **Humphrey**. Yes, well, I think that is the bottom-line essence, and I think that is the nub of it. I am not sure I agree with you; I am not sure I disagree with you. It is frankly something I had not really considered in any depth before. You had enumerated of number of instances or cases where symbols have been protected.

In your testimony or your prepared statement, you cited gravesites, for example. I do not think that is a very good example because that is property.

Professor **Tribe**. Now, how about from your own State, Senator? In New Hampshire, there was a slogan, "Live Free or Die," to go on license plates.

Senator **Humphrey**. Yes.

Professor **Tribe**. The Supreme Court said, in an opinion by Chief Justice Burger, that you cannot convict someone for refusing to carry that government slogan.

But all nine Justices agreed that the Government can protect those license plates, can print them up, can spend public money printing them up. What is that other than a government protection of a symbol?

Even if the license plate technically belongs to the vehicle owner, I do not think that the fact that all nine Justices say that New Hampshire does not have to stop putting its slogan on those license plates means that they have created another serious exception to the first amendment. It means that they do not really see the first amendment as implicated.

Senator **Humphrey**. Yes.

You cited also the Olympic symbol, but that again is a matter of property. That committee could not have functioned very well, if that symbol were counterfeited.

Professor **Tribe**. And in a sense several Justices have said—White, Rehnquist, and others—that in a very important way, even though someone may own his or her own flag, the flag is a national property, and if it were so declared——

Senator **Humphrey**. How so? How so? Just because one person says so? I mean that is a matter of opinion. If you go out and buy something and you create it, you buy it through your labor or you create it through your labor, it is yours.

Professor **Tribe**. But property of a public kind is created through positive law and through the blood that has been spilled, in the case of the flag. That is, it is not as though the U.S. Government by some fiat is saying, "Voila, all of these formerly private things are ours." The flag has its significance partly because of what the nation has done to build it into the symbol that it is.

Senator **Humphrey**. Yes.

Professor **Tribe**. So, it is not, I think, so strange to say——

Senator **Humphrey**. Yes.

Professor **Tribe** [continuing]. Given the precedents in copyright and other areas, that the U.S. Government can claim a paramount interest in that symbol, not an interest that prevents people from hanging it upside down, as the administration's amendment would purportedly authorize, that prevents people from speaking with it in their own way, but surely one strong enough to prevent people from physically impairing its embodiments.

And although I think some constitutional argument can be made even against that, it is not an argument that one could predict that any Justice would accept, so that right now I think that properly drafted law would have reasonably clear sailing.

Senator **Humphrey**. Yes. OK, well, let's run through that again. The first amendment defense would be rejected——

Professor **Tribe**. Rejected on the ground that the law does not aim at the expression of the person whose conduct is outlawed.

Senator **Humphrey**. Does not aim? Does not aim. Even though it hits?

Professor **Tribe**. Even though it hits.

But, remember what Mr. Barr said for the Department of Justice. The question is not what they hit; it is what they aim at. The question is the reason the Government has, and I am not yet persuaded that the only reason this Congress might have for protecting the symbol is that it does not like the Gregory Lee Johnsons and their message.

Senator **Humphrey**. Yes.

Professor **Tribe**. If that really were the only reason, if this really were a pretext for "getting" leftwing flagburners, as such, then I would be one of the first to agree that was impermissible. Although I think it is disingenuous of people to say that the Court would strike it down on that ground. The Court has never struck down an act of Congress——

Senator **Humphrey**. Yes.

Professor **Tribe** [continuing]. A facially neutral act of Congress on the ground that its purposes violated the free speech clause of the first amendment.

Senator **Humphrey**. I confess I did not listen to all, the entire exchanges that took place between you and other Senators, but have there been any recent cases that underline and reinforce this doctrine of protecting symbols, even if the effect of so doing is to constrict the first amendment privileges or rights, I should say?

Professor **Tribe**. I think the only Supreme Court cases on the point are *West Virginia Board* v. *Barnette* in 1943, holding that you cannot make someone pledge allegiance to the flag, but nonetheless you can specify a pledge and include it as part of the public curriculum. And that is including a symbol.

And then the case that I mentioned from New Hampshire, which was *Wooley* v. *Maynard,* in 1977; *Regan* v. *Taxation with Represen-*

tation, 1983; and *San Francisco Arts* v. *U.S. Olympic Committee*, 1987.

There are a lot of lower court cases as well, but I think in all of those cases what is interesting is that no Justice has expressed doubt that government's power to protect something because it is expressive——

Senator HUMPHREY. Yes, right.

Professor TRIBE [continuing]. Is somehow incompatible with the first amendment.

Senator HUMPHREY. Right.

Well, then, if you find it a legitimate interest, on the part of the government, to protect symbols, even though in protecting symbols first amendment rights are somewhat constricted, then, say again why you would not enshrine that at an even higher level through a constitutional amendment.

Professor TRIBE. Because what that amendment does is not enshrine the power to neutrally protect symbols but at least if it is this amendment it enshrines the power to censor viewpoints.

It is not the same thing under another guise; it is a very different thing.

Senator HUMPHREY. Why?

Professor TRIBE. I guess because the most important purpose of the first amendment—there are many purposes, but the most important is that in a free society we ought not to have the Government deciding which ideas and which viewpoints are acceptable and which are not.

That ought to be up to the individual who wants to express the viewpoint, even though words, contrary to the old schoolyard saying, can hurt as much as sticks and stones. It is so crucial in a free society that we not have some Grand Inquisitor, some central authority, deciding what is true and beautiful, deciding what views are acceptable.

And the only way you can implement that is to say that whenever the Government chooses to outlaw something it has to have a reason, independent of the viewpoint being expressed by the person the Government is going after.

The moment they can go after someone because of that person's viewpoint the power over ideas is reposed in "Big Brother." And that is the worst of all worlds, it seems to me.

Senator HUMPHREY. No question about that.

But I still do not see how the difference between the two amendments under consideration or discussion by this committee, the two proposals, the two avenues—one statute and one constitutional amendment—differ to the degree that one is benign and one is evil.

Professor TRIBE. Well, first of all, I don't—benign may be a little too strong. I am not an enthusiastic supporter necessarily of doing anything. I think that you have a powerful point, as did Senator Mathias, that simply being ignored may be the most appropriate punishment for the Gregory Lee Johnsons of the world.

And I also remind you, Senator, that I do say that there might well be a constitutional theory that says you should not be able to put anything up on this high a pedestal.

Senator HUMPHREY. Yes.

Professor **Tribe**. But apart from that, the difference, I think, is quite stark. One of them says:

> For good reasons or bad, we don't care what your message is, this thing means so much to us that we don't want to see it physically mutilated.

Senator **Humphrey**. Yes.

Professor **Tribe**. And the other says:

> We want to authorize 14,000 municipalities, 50 States, and Congress to prevent desecration, physical desecration of the flag, by which we mean, not only in the Preamble but in the testimony given in support of it, by which we mean, power to prevent displaying the flag in a contemptuous way.

Now, that power is very different from the power to protect the physical integrity of the symbol. That power, as I think became pretty clear in the colloquy between the chairman and the Assistant Attorney General, includes the power to say that when you do exactly the same thing but as part of a different political context, we can go after you on that ground.

And that seems to me to be the essence of what is evil under the first amendment.

Senator **Humphrey**. Thank you, Mr. Chairman.

Mr. Chairman, I have been asked by Senator Thurmond to place some questions in the record for Professor Tribe.

Am I suppose to ask these questions. I have used up my time. What am I supposed to do, submit the questions?

The **Chairman**. Without objection.

[The questions of Senator Thurmond follow:]

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September 7, 1989

Senator Strom Thurmond
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Senator Thurmond,

I am writing in response to the written questions you submitted to me after my testimony before the Senate Judiciary Committee this August 1.

For your convenience, I will repeat each of your questions before offering my written responses.

1. QUESTION: Do you agree that if the Government's reason for the statute is related in any way to expression then the Supreme Court will apply exacting scrutiny?

What reason could the Government possibly advocate for prohibiting flag desecration that is not related to an expression of the Flag's symbolic value?

ANSWER: If the Government's reason for enacting a statute prohibiting the physical destruction or mutilation of any American flag is "related to expression" only in the limited sense that the Government chooses to protect American flags as revered objects having primarily expressive or symbolic significance, then the Supreme Court would not apply exacting scrutiny. Such scrutiny is reserved for situations in which the Government's reason for a prohibition is "related to expression" in the quite different sense that the Government's interest relates to the expression involved in the actions the Government has chosen to prohibit. If this were not the case, then the laws that have been enacted to protect monuments, gravesites, American eagle feathers, and objects or places of special historical and/or symbolic significance would be subject to exacting scrutiny -- something the Supreme Court has never remotely suggested. Similarly, laws protecting speakers from being interrupted, although "related to expression" in the limited sense that their aim is to protect expression, are not subject to exacting scrutiny -- provided the laws are not structured in terms of, or enacted for the purpose of singling out, the views or ideas expressed by the conduct involved in interrupting the speakers, and provided the laws do not selectively protect only speakers who share the government's viewpoint.

2. QUESTION: In Wallace v. Jaffree, the Supreme Court struck down the Alabama moment of silence statute despite Alabama's assertion that the statute was based on a secular purpose. The Court believed that the legislature had passed the statute for religious purposes. Explain how the "flag statute", which you say is neutral in its application, could survive the Supreme Court's scrutiny if they look behind the actual language as it did in the Jaffree decision?

ANSWER: Even if the Court looked behind the law's language, the motive or purpose it would discover, if I am correct in my answer to your first question, would be entirely consistent with the First Amendment as the Supreme Court has previously construed it. Moreover, the Court has repeatedly indicated that it will make a more searching inquiry into legislative motive or purpose in evaluating challenges brought under the Establishment Clause of the First Amendment than in evaluating challenges brought under the Free Speech Clause of the First Amendment. The Court has never struck down a facially neutral Act of Congress on the theory that it was motivated by a desire to suppress speech, where the law was otherwise unobjectionable.

3. QUESTION: Which Justice or Justices from the majority in the Johnson case do you believe might vote to sustain a statutory approach and why?

ANSWER: Based on the analysis offered in my prepared testimony on August 1, 1989, and in my answers to questions put to me by various Members of the Judiciary Committee on that day, I am quite confident that, if the statute at issue were properly drafted, Justices Blackmun, Scalia, and Kennedy -- and perhaps also one or more of the remaining two Justices in the Texas v. Johnson majority -- would vote to sustain the statute against a facial attack and would vote to uphold a neutrally motivated conviction obtained under the statute. The reason, as I attempted to explain on August 1, is that no majority or concurring opinion ever written by any Supreme Court Justice has questioned the constitutional validity of a statute broadly aimed at protecting the physical integrity of all American flags; that Justice Blackmun has specifically voted to uphold a conviction that he understood as resting on such a protective provision;

that the dissenting opinion in which he did so -- Smith v. Goguen -- was cited with approval in footnote 6 of the Texas v. Johnson majority; and that there is no reason to suppose Justices Scalia or Kennedy would take a more restrictive view of governmental power in this area than did Chief Justice Earl Warren, Justice Hugo Black, and Justice Abe Fortas, all of whom voted to uphold a conviction on this basis in Street v. New York.

Sincerely,

Laurence Tribe

Laurence H. Tribe

The **Chairman**. Senator Kennedy.

Senator **Kennedy**. I want to join in extending a warm welcome to you, Professor Tribe. I have found this presentation this afternoon enormously illuminating, and I am very hopeful that our colleagues will take the time to familiarize themselves with what, I think, is an excellent exposition, not only on the first amendment but on these cases that are affecting the first amendment, and the flag.

Let me look at this from a somewhat different point of view, and that would be the kind of mischief that you might be able to perceive reading the proposed amendment, hearing from Mr. Barr, understanding, as least, what these words mean in terms of various holdings by the courts.

What would be the kinds of laws or statutes that could be developed either in the states, or maybe in local governmental districts that could still conform with that language that you think would be either ludicrous or be extremely unwise?

Can you give us some examples?

Professor **Tribe**. I think there are two sets of laws, because if you look at the testimony in support of the amendment, it suggests that these are the kinds of laws that they may want. One kind of law would deliberately single out particular political messages and say that if you handle the flag in a certain way with that political message in mind it is contemptuous, and otherwise not.

And presumably the laws would not be likely to say that if you go to a flag factory and fondle the flag as part of a political campaign that is contemptuous. They would rather say if you fly the flag upside down as part of a particular kind of protest of government policy then that is contemptuous.

It gives license to people to say that this unique symbol, this important symbol, which we all should be able to use to express our points of view, can be used only in approved ways. They say that is not what they want, but by authorizing laws at every level of Government to punish the physical desecration of the flag and defining desecration in terms of contempt that is displayed, that is exactly what is authorized.

The other thing that I think is quite awful is that it authorizes laws that are completely incomprehensible. Vague laws that violate not only free speech principles, but principles of fair notice and due process and the rule of law.

I think that was the central point that Justice Powell made, for example, in *Smith* v. *Goguen* against the State law in that case. It said treating a flag contemptuously is against the law. He said contempt is in the eye of the beholder. No one can know what that law means. Effectively it says that prosecuting authorities have the power to pick and choose as they will based on religious or political or racial preference if they want, you could never prove it, which displays of the flag will be treated as respectful and patriotic and which not.

What that really means is that the Government will be able to appropriate the flag for approved use only. It doesn't say that, but I think that is the effective meaning. And what that does in terms of people's capacity to conform their conduct to the law is that they have got to just stay away from the flag if they want to avoid being entrapped, and I think that would be a sad development as well.

Senator **Kennedy**. Well, wouldn't Mr. Barr respond to that?

It isn't the Government. It would be what would be the way that the law would be designed and whether reasonable men would interpret it as being a despicable act, and therefore that is where the real repository of judgment will be, not necessarily with the State government?

Professor **Tribe**. Yes. I reject the notion that one can take meaningful guidance from what a hypothetical reasonable man might say about a flag flying upside-down or a flag on someone's scarf or a flag on the seat of the pants. It seems to me that provides no guidance at all. No ascertainable standard, as the Court suggested.

Senator **Kennedy**. Let me just ask briefly, because there is certainly a feeling and a belief that these constitutional rights are intertwined with each other—the first amendment is with other constitutional rights. Now once you begin to see some change or adjustment, even in terms of this flag amendment, it does have implications for the protections of other rights. Is that accurate, or should we be concerned?

Professor **Tribe**. Senator Kennedy, we have no experience yet with tampering in quite this direct and radical a way with the Bill of Rights. We haven't done it once in our history, and I suppose it is a prediction whether it would become a bad habit; whether, having succumbed to those who are profoundly offended, as most of us are, by Gregory Lee Johnson's act, whether the Government would next succumb to those who are offended by burning crosses or by swastikas or by any of a number of other things that might offend a minority rather than a majority, and I guess there is a dilemma.

Either, on the one hand, we would begin making all kinds of exceptions when various groups are offended, exceptions to what we had assumed were basic rights, in which case the extraordinary edifice of the Bill of Rights begins to crumble, or we make those exceptions only when a large enough majority makes a visible and audible outcry, in which case the legitimacy of the Constitution is eroded.

What do we say to the Holocaust survivors in Skokie, IL, when they ask that the goose-stepping Nazis be prevented from demonstrating? What do we say to their offense? So far what we have said is that is the price we pay for a free society. But if that is not the price we pay when a large enough majority wants to censor unpopular views, we run out of answers. We run out of answers to the women who want to censor pornography. We run out of answers to the minorities who want to censor racist speech. We run out of answers to the people who find various expressions offensive. And, if we run out of answers, we run out of legitimacy.

Senator **Kennedy**. Thank you very much, Mr. Chairman.

The **Chairman**. Mr. Tribe, as usual you make complicated notions clearly understandable. I say that notwithstanding the fact that I may be viewed as not having an objective view about you, but I nonetheless think the committee would agree with that.

I have about 10 or 12 questions, but in light of the way the day has gone and there are so many distinguished people following you, I will refrain and may either (a) submit them to you in writing or possibly ask you to come back in September.

Professor **Tribe**. Either will be fine, sir.

The **Chairman**. But I suspect it will be the former. Thank you very, very much for your input. Appreciate it.

[The questions of Professor Tribe follow:]

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September 7, 1989

Senator Joseph R. Biden, Jr.
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Washington, D.C. 20510-6275

Dear Senator Biden:

I am pleased to submit this reply to your written questions following up on my testimony before the Senate Judiciary Committee on August 1, 1989. For your convenience, I append to this letter a copy of your written questions.

Question 1, Part A: None of the laws struck down by the Supreme Court over the past twenty years on the subject of flag desecration imposed a flat ban on destroying the flag, nor has the Supreme Court ever held, in Texas v. Johnson or previously, that the First Amendment includes a general right to burn the flag.

Question 1, Part B: The Spence case, where the defendant attached a peace symbol to a flag, is not precedent for striking down the legislation you have proposed. The Supreme Court majority in that case stressed the fact that the peace symbol was attached with readily removable tape, and that removing the symbol would cause no damage to the physical integrity of the flag, which the Court regarded as unaffected by the conduct for which the individual was prosecuted. Although the dissenters disagreed, the majority accordingly saw the case as one in which the individual was being prosecuted solely and simply because of the views he expressed by attaching his symbol to the flag.

Question 2, Part A: Justice Blackmun's vote in Smith v. Goguen reflected his view that the physical integrity of the flag involved in that case was compromised when the defendant attached it with needle and thread to the seat of his pants, and that it was solely on that account that the state had chosen to punish him. That evidently remains not only Justice Blackmun's view, as indicated by the favorable citation to his Smith v. Goguen opinion in footnote 6 of the Texas v. Johnson majority (for which Justice Blackmun provided the crucial fifth vote), but also the authoritative Supreme Court view of the meaning of that seat-of-the-pants case. Specifically, the current majority reads that prior case as standing for the proposition that, insofar as someone is prosecuted only for damaging the physical integrity of an American flag, that prosecution is not barred by the First Amendment -- but, insofar as someone is instead prosecuted for the message he communicates by what he does with the flag, that prosecution is so barred. So understood, the prior case, and Justice Blackmun's vote, represent no inconsistency whatever with the analysis I offered the Committee on August 1, nor is there any contradiction in the basic views espoused by Justice Blackmun over the years on this subject.

Question 2, Part B: Justice Blackmun's votes in those two cases strongly suggest that, in a case challenging the constitutionality of the Biden-Roth-Cohen Legislation, Justice Blackmun would be with a majority to uphold the legislation.

Question 3: I believe that a legislative exception for the orderly disposition, by Veterans or other groups, of dirty and torn flags, could be drafted without setting up the kind of content-based distinction against which the Supreme Court in Texas v. Johnson warned. It is important, however, that the statute not draw a distinction between patriotic, ceremonial disposition of a worn-out flag and unpatriotic, contemptuous disposition of such a flag. The veteran who wishes to be cremated with a worn-out flag must be treated the same as the Communist who wishes to be cremated with one, and no-one may be permitted to burn or destroy a still usable flag simply because his or her purpose in doing so is to express reverence for the country.

Question 4: In both the 1978 edition of my treatise, and the 1988 edition, I addressed Professor Ely's argument and explained my reasons for finding it unpersuasive. In essence, as I tried to explain more fully on August 1, there is no First Amendment prohibition against laws that grant special and unusual protection to particular expressions or symbols. If there were, then the laws providing special protection for the Olympic Symbol or the Olympic Flag would be suspect under the First Amendment, as would the laws authorizing the manufacturing of American flags with which to ring the Washington Monument. To be sure, laws making it a more serious offense to interrupt a patriotic speech than an unpatriotic speech would presumptively violate the First Amendment. But laws giving special protection to American flags, as opposed, say, to Chinese or Russian flags, are not of this character. For the American flag stands for many different messages and cannot be equated with patriotic expression alone. Thus the Ely argument, which in my view is the best of its type, does not cast serious doubt upon the ability of the Biden-Roth-Cohen Legislation to withstand First Amendment attack in the current Supreme Court. At the same time, as I testified on August 1, I do believe that the

First Amendment ought eventually to be read in such a way as to cast considerable doubt on government's ability to exalt a specific symbol of nationhood to nearly sacred status. But that is simply my own view of the First Amendment, and not a reflection of existing constitutional doctrine.

Sincerely,

Laurence Tribe

Laurence H. Tribe

LHT:js

QUESTIONS FROM SENATOR BIDEN FOR PROFESSOR TRIBE

QUESTION 1:

PART A

FOUR TIMES DURING THE PAST 20 YEARS THE SUPREME COURT HAS REVIEWED CRIMINAL CONVICTIONS FOR BURNING, DEFACING OR MISUSING AN AMERICAN FLAG. EACH TIME THE COURT HAS REVERSED THE CONVICTION ON FIRST AMENDMENT GROUNDS.

DID THE LAWS STRUCK DOWN IN ANY OF THOSE FOUR CASES IMPOSE A FLAT BAN ON DESTROYING THE FLAG, AND IN ANY OF THOSE DECISIONS -- TEXAS AGAINST JOHNSON BEING THE MOST RECENT -- HAS THE SUPREME COURT EVER HELD THAT THE FIRST AMENDMENT INCLUDES A GENERAL RIGHT TO BURN THE FLAG?

PART B:

WHAT ABOUT IN SPENCE AGAINST WASHINGTON, WHERE THE DEFENDANT ATTACHED A LARGE PEACE SYMBOL TO A FLAG, WHICH HE THEN HUNG OUTSIDE HIS APARTMENT WINDOW? THE JUSTICE DEPARTMENT ARGUES THAT THE LAW AT ISSUE IN THAT CASE WAS ALMOST IDENTICAL TO THE BIDEN-ROTH-COHEN LEGISLATION, AND THAT THE COURT'S REVERSAL OF THE CONVICTION IN THAT CASE COMPELS THE CONCLUSION THAT THE BIDEN-ROTH-COHEN LEGISLATION IS ALSO UNCONSTITUTIONAL. WOULD TODAY'S SUPREME COURT TREAT THE SPENCE CASE AS CONTROLLING AND RELY ON IT TO STRIKE DOWN MY LEGISLATION?

QUESTION 2:

PART A:

PROFESSOR, WHEN ALL IS SAID AND DONE, THE PRINCIPAL QUESTION SEEMS TO BE WHETHER THERE ARE AT LEAST FIVE JUSTICES ON THE SUPREME COURT WHO WOULD FIND THE BIDEN-ROTH-COHEN LEGISLATION TO BE CONSTITUTIONAL.

ONE OF THE POTENTIAL SWING VOTES IS JUSTICE BLACKMUN.

OF INTEREST TO ME AS I'VE STUDIED THIS ISSUE THE PAST SEVERAL WEEKS IS THE FACT THAT JUSTICE BLACKMUN VOTED TO SUSTAIN A CONVICTION IN ONE CASE INVOLVING MISUSE OF THE FLAG -- SMITH V. GOGUEN -- AND VOTED TO OVERTURN A CONVICTION IN ANOTHER CASE INVOLVING MISUSE OF THE FLAG -- TEXAS V. JOHNSON.

IS THERE SOME WAY TO RECONCILE HIS TWO POSITIONS, OR ARE HIS TWO VOTES SIMPLY EXPLAINED BY THE FACT THAT HE'S CHANGED HIS MIND? PUT DIFFERENTLY, ARE HIS VOTES IN THOSE TWO CASES CONSISTENT OR CONTRADICTORY?

PART B:

WHAT DO HIS TWO VOTES IN SMITH V. GOGUEN AND TEXAS V. JOHNSON SUGGEST TO YOU ABOUT WHERE HE'D BE IN A CASE CHALLENGING THE CONSTITUTIONALITY OF THE BIDEN-ROTH-COHEN LEGISLATION?

QUESTION 3:

AS YOU KNOW, ONE OF THE ISSUES THAT'S COME UP EVER SINCE I INTRODUCED MY ORIGINAL LEGISLATION TWO DAYS AFTER THE COURT'S DECISION IS HOW ONE GOES ABOUT DISPOSING OF DIRTY, TORN AND SOILED FLAGS -- FLAGS THAT UNDER FEDERAL REGULATIONS ARE NO LONGER FITTING EMBLEMS FOR DISPLAY.

THE QUESTION THAT'S BEEN RAISED IS THIS -- IF WE ALLOW VETERANS AND OTHER GROUPS TO DISPOSE OF DIRTY AND TORN FLAGS, ARE WE SETTING UP THE KIND OF DISTINCTION THAT THE SUPREME COURT IN TEXAS V. JOHNSON WARNED AGAINST?

IS THIS A PROBLEM OF CONSTITUTIONAL DIMENSION, AND IS THERE A WAY, IN YOUR VIEW, TO DEAL WITH THIS ISSUE WITHOUT FALLING INTO THE SAME TRAP THAT TEXAS DID WITH RESPECT TO ITS STATUTE IN TEXAS V. JOHNSON?

QUESTION 4:

PROFESSOR TRIBE, AS I'VE STUDIED THIS ISSUE DURING THE PAST SEVERAL WEEKS, I'VE BEEN INTRIGUED BY AN ARGUMENT MADE BY JOHN HART ELY IN A 1975 ARTICLE ON FLAG PROTECTION LEGISLATION. AT THE END OF HIS ARTICLE, PROFESSOR ELY SAYS THAT FLAG PROTECTION STATUTES ARE TROUBLING BECAUSE, IN EFFECT, THEY GRANT SPECIAL AND UNUSUAL PROTECTION TO CERTAIN EXPRESSION THAT THE GOVERNMENT HAS DEEMED TO BE OFFICIALLY ACCEPTABLE. PROFESSOR ELY ADDS THAT FLAG PROTECTION LEGISLATION IS, IN HIS VIEW, SIMILAR TO LAWS THAT PROHIBIT THE INTERRUPTION OF PATRIOTIC SPEECHES.

HOW PERSUASIVE IS THIS ARGUMENT, AND DOES IT IN YOUR MIND CAST DOUBT UPON THE CONSTITUTIONALITY OF THE BIDEN-ROTH-COHEN LEGISLATION?

HARVARD UNIVERSITY
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LAURENCE H. TRIBE
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September 7, 1989

Senator Charles E. Grassley
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Senator Grassley:

I am pleased to answer the questions you have put to me in writing following my Senate Judiciary Committee testimony of August 1, 1989.

You ask, first, how much tolerance "we show to those who -- if their views were to prevail -- would show us none." My answer is: as much tolerance as the First Amendment requires. In essence, that means never succumbing to the temptation to punish even the intolerant based on our quite justifiable abhorrence for the content of their views. But that also means never conferring upon anyone, simply because of that person's views -- be they tolerant or intolerant -- a special immunity or privilege from the otherwise valid application of valid and neutral rules, such as rules protecting physical objects from wanton destruction.

You ask, second, whether "all acts of disrespect, undisciplined behavior, and violence have to be excused, accepted, or tolerated as a right of personal freedom." My answer is: Certainly not. Many such acts ought to be, and many are, condemned by entirely valid and constitutional statutes, rules, and regulations, both civil and criminal. Liberty does not mean license; it never has, and it never should.

You ask, third, whether the Federal or State Governments cannot "constitutionally punish actions such as delivering a political message over television in obscenities," or "expressing a political viewpoint from a sound truck at two-o'clock in the morning in a residential neighborhood," or "making a point by engaging in indecent public behavior". My answer is that government has ample authority, under the First Amendment as construed by the Supreme Court, to ban all uses of obscenity, to protect residential tranquility from the sort of expression you posit, and to ban a wide variety of indecencies in public, regardless of whether the person committing such indecencies is doing so to make a point or otherwise.

You ask, fourth, whether the Court's Johnson decision might not have the "logical extension" of protecting "public nudity or even sexual acts done in public, as long as these actions are accompanied by some message or protest against society's morals." My answer is: Certainly not. The Supreme Court's decision in Texas v. Johnson confers no protection whatever upon properly prohibited acts, public or private, simply because they are accompanied by, or engaged in so as to express, some message or protest. That Supreme Court decision merely holds that government may not undertake to prohibit or punish acts because of the message or protest that those acts express, or with which those acts are accompanied. A law banning public nudity -- period -- would be fine. A law saying "it shall be a crime to disrobe in public for the purpose of making a political statement about laws dealing with nudity" would not be fine.

You ask, fifth, whether a civilized society has the "ability to declare that certain objects and symbols occupy such a venerated status in that society that their physical integrity can be protected from desecration." My answer is that nothing in Texas v. Johnson, or in the Supreme Court's prior First Amendment jurisprudence, prevents government from making precisely such a declaration, provided the law doing so does not single out for special punishment the desecration of such objects or symbols when engaged in for the purpose of expressing a disrespectful view, or with the likely effect of communicating such a view.

You ask, sixth, whether the Supreme Court does not "need to follow . . . community standards, rather than their own moral, political and aesthetic preferences." My answer is: Of course the Court needs to follow the community's standards -- as expressed in the community's most fundamental law, the Constitution of the United States. Justices who instead follow either their own preferences or their own reading of current community sentiment are not being faithful to their oaths to protect and defend the Constitution.

You ask, seventh, for my opinion of the analysis that the President's proposed Amendment does not by itself prohibit anything but "merely allows the people to enact laws prohibiting flag desecration, something that 48 states and the Federal Government already had on the books, prior to the Johnson decision, without any protest." My answer is that the proposed Amendment does not by itself prohibit anything -- but that, in terms of its text, its preamble, and its obvious purpose, it does considerably more than merely allowing people to do what they were free to do, without civil liberties protest, prior to Johnson. On the contrary, it has been clear for many years that, in terms of well established First Amendment doctrine, many of the laws criminalizing contemptuous display of the flag, or contemptuous acts of flag desecration, impermissibly single out the actor's message rather than permissibly protecting the flag's physical integrity.

You ask, eighth, whether the President's Amendment is "simply a 'restoration' of the Constitution." As my August 1 testimony and my answers to your other questions make clear, I do not think that position can be responsibly maintained. The proposed Amendment, far from restoring the Constitution, endangers its most cherished premises.

You ask, ninth, for my opinion of the analysis that the proposed federal statute "may reach private conduct that most people do not want to criminalize, while at the same time enacting a statute that will be held unconstitutional if it is applied to public acts of flag burning, which most people appear to want to criminalize." I do not have a high opinion of that analysis. If the statute is passed, it will be because people do in fact want to criminalize all acts of wanton flag destruction regardless of where they occur. And if the statute has that structure and effect, it will not be struck down simply because an act to which it is applied occurs in public.

You ask, tenth, for my opinion of the analysis that the Johnson rationale might invalidate laws against desecrating synagogues or the homes of black people. As I explained at some length on August 1, such laws are not rendered vulnerable by anything in Johnson or its rationale -- provided the laws are neither written nor enforced in ways that target the particular views held or expressed by those who desecrate such places.

You ask, eleventh, for my opinion of the argument that a desecrator of a venerated object or symbol may be "tortiously inflicting mental distress on the individuals who view the handiwork" and that the state has a legitimate interest "in protecting the public against the harm caused by the mere desecration of such an object or symbol, regardless of the message." The principal point of my August 1 testimony was to endorse the essence of that argument.

You ask, twelfth, whether I agree with L. Gordon Crovitz that "the fact of public outrage over the flag decision is itself good evidence that the Justices got the law wrong." I do not. In this instance, at least, I believe that the fact of public outrage is evidence that the public did not carefully study what the Justices said or why they said it. In any event, I do not think we have or need a Supreme Court in order to reflect public opinion; the Court's most basic purpose is to defend the Constitution from whatever momentary passions might move the public and its representatives.

You ask, thirteenth, whether I agree with Robert Bork's view that any statute passed in response to *Johnson* "would be seen as an attempt to change the *result* of that case, no matter how neutrally the statute is worded," and that the statute's "legislative history . . . would reveal that it was *designed* to *prevent* the *expression* of an *idea* by desecrating the flag," and that "Congress could articulate no [other] reason for prohibiting the defacement or destruction of the flag," and that "lower courts would [accordingly] declare such a statute unconstitutional based upon the *Johnson* decision, [and that] the Supreme Court might not review those decisions." The answer, for all the reasons developed at length in my August 1 testimony and above, is that I emphatically disagree with each and every part of that view.

You ask, fourteenth and finally, whether there is "*any* language [I] could recommend to the Committee -- in the form of a proposed Constitutional Amendment -- that would remedy the *Johnson* decision." My answer is that no amendment is needed to "remedy" a decision that, properly understood, leaves Congress and the States free to protect the physical integrity of all American flags. An amendment designed to underscore that Congress and the States have this freedom would be entirely superfluous and unnecessary. An amendment designed to go further, and to give government the ability to punish people based on the views they express, would undermine core First Amendment values that I believe all of us ought to endorse. Accordingly, I could not in good conscience recommend an amendment, however phrased, that would have any such effect.

Sincerely,

Laurence Tribe

Laurence H. Tribe

LHT:js

The **Chairman**. Again, excuse the delay. We are trying to work out scheduling dilemmas of the witnesses.

Once again, the way this place works is through an occasional bit of generosity. I am just told that Mr. Cooper will be kind enough to let Dean Stone go first because he has a plane. So, Dean, would you come forward?

Mr. Cooper, I thank you very, very much. This is getting to be, your tolerance is——

Mr. **Cooper**. I made the mistake of getting a later reservation for my plane.

The **Chairman**. Solicitor Griswold is on the end of the day here and I really feel so badly keeping you waiting this long, but I don't know what else to do about it at this point. And I say to you, Dean Griswold, if you would, in light of the fact I have kept you so long, if you would rather come another day, I will give you a whole day, or we will keep going. But it is up to you. I apologize for having kept you waiting. I plan on staying here until you testify, but if you decide you are tired of sitting and you want me to have you any other time, I will do that.

Let me begin now with Dean Stone. Dean Stone is one of the most distinguished American scholars on the Constitution. He is dean of the University of Chicago Law School and is one of the most widely recognized experts on the first amendment, and I suspect one of the most widely quoted as well, and I am very careful to quote these days.

Dean Stone, welcome. Thank you again for your patience and tolerance, and would you please proceed.

STATEMENT OF GEOFFREY R. STONE, DEAN, UNIVERSITY OF CHICAGO LAW SCHOOL

Dean **Stone**. Thank you very much. I would like to thank Mr. Cooper for his graciousness. He knows now that I owe him one.

I would like also to thank the members of the committee for inviting me to appear today to discuss with you the implications of the U.S. Supreme Court decision in *Texas* v. *Johnson* and the various measures that have been proposed in response to that decision.

I would like to emphasize at the outset that in my judgment the Court's decision in *Texas* v. *Johnson* was premised upon a sound understanding of well-settled principles of first amendment jurisprudence. Indeed, as Professor Tribe said earlier, for those who are familiar with the basic precedents and doctrines that have evolved over the past 70 years, *Johnson* was hardly surprising. To the contrary, *Johnson* followed quite sensibly from some of the most basic, most firmly established, and most well-reasoned precepts of American constitutional law.

Having said that, I would like to turn to the main thrust of my remarks. Specifically what I would like to do is to focus on the constitutionality of the proposed Biden-Roth-Cohen Flag Protection Act of 1989. We have heard a lot today about whether this act is constitutional or not constitutional. What I would like to do is to divide my inquiry into two parts.

First, does the principle on which the *Johnson* decision was premised invalidate this proposed legislation? And, second, is there any other basis upon which one might question the constitutionality of the proposed legislation?

I conclude that *Johnson* does not directly control the constitutionality of the Biden-Roth-Cohen Act. That there are other possible bases on which one might question the constitutionality of the proposed legislation, but that in the end there are at a minimum reasonable grounds to believe that the Supreme Court would uphold the proposed statute.

Let me begin with *Johnson*. As you know, the Court in *Johnson* invalidated a Texas statute which prohibited any person knowingly to desecrate the American flag, by defacing, damaging or otherwise physically mistreating it, in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action. The Court held this unconstitutional as applied to an individual who publicly burns the flag as a form of political protest.

Now, to understand *Johnson*, it is essential to recognize that the decision was premised upon a critical distinction in first amendment doctrine. But central to the Court's reasoning was the question whether the Texas statute was related or unrelated to the suppression of free expression.

Under existing law, a law is related to the suppression of free expression if either of two circumstances are present. First, the law expressly restricts the communication of particular messages or, second, it restricts speech because of the reaction of others to the content of the message conveyed. A law is unrelated to the suppression of free expression if it applies wholly without regard to the content of the message conveyed. Now this is a rather complex and subtle distinction, but it is central to our first amendment jurisprudence, and it may help if I offer a few illustrations.

A law that prohibits any person to display a sign in the Senate Gallery that criticizes a Member of the Senate is related to the suppression of free expression because it expressly restricts the communication of a particular message, in this case the criticism of Senators. A law that prohibits any person to display a sign in the Senate Gallery that may offend Members of the Senate is also related to the suppression of free expression, because although it is not directed at the communication of any particular message it will be applied to some speakers and not to others, depending upon the reaction of persons, in this case Members of the Senate, to the content of the message conveyed.

And finally, a law prohibiting any person to display any object including a sign in the Senate Gallery that might block the view of spectators is unrelated to the suppression of free expression because it is not directed at speech, it applies to speakers and nonspeakers alike, and it operates wholly without regard to the content of any particular message.

Now, as the Court observed in *Johnson*, it is well settled that laws that are related to the suppression of free expression within this definition are especially problematic under the first amendment, for by restricting only some messages and not others, such laws are especially likely to distort the substantive of public debate and to mutilate the thought processes of the community. Such laws are thus presumptively unconstitutional.

In *Johnson*, the Court quite correctly recognized that the Texas statute was related to the suppression of free expression. As the Court explained, and we have heard this quote before today:

> The Texas law is not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others.

Citing more than a dozen precedents the Court then observed:

> If there is a bedrock principle underlying the first amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

The Court therefore concluded that in such circumstances the restriction on Johnson's expression was content based, and must thus be held unconstitutional unless the State's interest can survive the most exacting scrutiny.

The key point then is this. The decision in *Johnson* was expressly predicated on the Court's conclusion that the Texas law was related to the suppression of free expression. The Court did not hold that there is an inviolable first amendment right to burn the American flag as a means of political protest as such; rather the Court held only that the specific Texas flag desecration statute before it was an unconstitutional means of attempting to regulate such conduct.

Indeed, as the Court itself emphasized, it is not simply the nature of the expression but also the governmental interest at stake and the nature of the regulation that help to determine whether a particular restriction on expression is valid.

Now this is again a critical distinction and an example might help to clarify. Consider the situation of an individual who is convicted of burning an American flag in public as a means of political protest in violation of a city ordinance prohibiting any person to make an open fire in a public place. Although *Johnson* invalidated the Texas flag desecration statute, that opinion tells us little, if anything, about the constitutionality of this conviction. For unlike the Texas statute, the hypothetical open fires ordinance is not content based, is unrelated to the suppression of free expression, and need not be subjected to the most exacting scrutiny. In short, the constitutionality of the open fires law is simply not governed by *Johnson*.

Now, with this understanding of *Johnson* in mind, I would like to turn to the Biden-Roth-Cohen Flag Protection Act of 1989, which would prohibit any person knowingly to mutilate, deface, burn, maintain on the floor or ground, or trample upon the flag of the United States. It is essential to note that, unlike the Texas law invalidated in *Johnson*, the proposed legislation does not refer to desecration and it does not in any sense turn on whether the prescribed conduct will seriously offend others.

Indeed, the proposed legislation applies to the individual who burns a flag in private to ignite a fire in his fireplace as well as to the individual who burns a flag in public to protest Government policy. The proposed legislation applies without regard to whether the conduct takes place in public or in private, without regard to whether it is undertaken for expressive or for other purposes, without regard to whether it offends other, and without regard to any particular message the individual may seek to convey.

Unlike the Texas law invalidated in *Johnson*, the proposed legislation is not content based, it is not directly related to the suppression of free expression, and its constitutionality is thus not controlled by the principles that dictated the outcome in *Johnson*.

Put simply, the decision in *Johnson* v. *Texas* does not of its own force invalidate the Biden-Roth-Cohen Flag Protection Act of 1989. Now this is not to say that the proposed legislation is necessarily immune to constitutional challenge completely. To the contrary, there are at least three possible grounds on which one might question the constitutionality of the Biden-Roth-Cohen Act, and I would like briefly to address them.

First, even if the proposed legislation is understood to be unrelated to the expression of free expression and neutral with respect to content, it may still violate the first amendment as an impermissible, content-neutral restriction of speech. As the Court has long recognized, even laws that are neutral with respect to content may violate the first amendment if their restrictive impact on the opportunity for free expression outweighs the legitimate governmental interest that they serve.

In general, however, the Court tends to apply a relatively deferential standard in cases involving content neutral restrictions. The closest analogy is *United States* v. *O'Brien*, in which the Court upheld a Federal statute prohibiting any person to forge, alter, knowingly destroy, or knowingly mutilate a draft card, as applied to an individual who publicly burned his draft card as an act of political protest.

Noting that that statute was designed to facilitate the administration of the Selective Service laws, that it was content neutral, and that it was unrelated to the suppression of free expression, the Court held that the challenged law was constitutional because it reasonably furthered a substantial governmental interest.

Assuming that the Government's interest in protecting the physical integrity of the American flag is a similarly substantial governmental interest, a question I will turn to in a moment, *O'Brien* seems to me strongly to suggest that if the proposed legislation is understood to be content neutral and unrelated to the suppression of free expression, it too would in all likelihood withstand content neutral review.

A second possible objection to the proposed legislation turns on the issue of impermissible legislative motivation. I have no doubt that if the Biden-Roth-Cohen Flag Protection Act is nothing more than a cynical effort to circumvent the decision of the U.S. Supreme Court in *Johnson* and to suppress through the back door the use of the American flag for the expression of ideas that are offensive to the American people, then you should think not twice but three times before you support this legislation, for such a motivation would clearly violate the Constitution.

Perhaps ironically, however, if the proposed legislation were in fact to be enacted even for such reasons, the Court would not necessarily invalidate it on that basis. For as Professor Tribe noted, the Court has often inquired into the motivation underlying executive and administrative decisions, it has generally been reluctant to inquire into the motivation underlying legislative actions.

This then brings me to the third and final possible objection to the proposed legislation. The issue may be stated as follows: What precisely is the purpose of this legislation? If it is not designed merely to circumvent *Johnson* and to suppress the use of the flag for the expression of offensive and unpatriotic opinions, what is it designed to do? Is there, indeed, any legitimate justification for this legislation that is, in fact, unrelated to the suppression of free expression?

The simple answer, of course, is that this legislation is designed not to censor critics of the flag or of the Nation, but to protect the physical integrity of the flag itself. It is designed, in other words, to preserve the flag as an allied symbol of nationhood and national unity, and to prevent any physical damage to the flag that might dilute its symbolic power.

It is not, however, that simple. For as the Court intimated in both *Johnson* and *Spence,* that interest may itself be related to the suppression of free expression, and this is so for at least two possible reasons.

First, if the purpose of this legislation is to preserve the symbolic value of the flag as an expression of national unity, then it would seem that the only acts of physical impairment that would actually undermine that purpose are those acts that impair the physical integrity of the flag in order to convey a different and inconsistent message. And, if that is the case, it is at least difficult to see how the legislation is unrelated to the suppression of free expression or, indeed, how it could rationally be applied to individuals like the individual who burns the flag to start a fire in a fireplace, whose physical impairment of the flag does not threaten its expressive value at all.

Second, if this is the purpose of the law, its goal is essentially to protect the flag as a form of governmental speech. In effect, the legislation prohibits anyone to interrupt the Government's message encapsulated in the flag by impairing the physical integrity of the flag. This, too, raises an interesting question. May the Government constitutionally prohibit the interruption of its speech while not providing similar protection to the speech of others; for example, by prohibiting the physical impairment of the Nazi or Communist flags as well? These are for first amendment scholars puzzling and as yet unresolved questions.

It may be that I have defined the Government's interest too narrowly. Perhaps the purpose of this legislation is not to preserve the value of flag as an unambiguous symbol of nationality unity, but rather to establish the flag, in the words of the Texas statute, as a "venerated object." Certainly there are religious groups that prescribe the physical impairment of venerated objects without regard to either the expressive function of the object or the expressive intent of the individual who defaces it.

But may the U.S. Government constitutionally declare the flag of the United States a venerated object? Here again we are in essentially unexplored territory. In my judgment, these are quite subtle and complex issues on which reasonable minds can, do, and will differ. They were not resolved in *Johnson* and they have not been resolved in any other decision of the U.S. Supreme Court.

Accordingly, I cannot say and I do not think anyone else can fairly say that the Biden-Roth-Cohen Flag Protection Act is necessarily constitutional or necessarily unconstitutional under existing law. As evidenced by the Barr-Tribe disagreement about these very issues, it is clear that reasonable minds can disagree. In my view, it is not as clear as Mr. Barr would have us believe and it is not as clear as Mr. Tribe would have us believe either. But it is clear to me that there are at least reasonable grounds to believe that the proposed legislation might as well be upheld by the Supreme Court.

I would like to conclude with one final observation. There is, quite simply, no doubt in my mind that given a choice between the proposed legislation and a constitutional amendment to override *Johnson* that the legislation is in every respect the more sound and the more responsible route.

As Senator Specter suggested earlier today, the Supreme Court has long been guided by the principle that it will not address constitutional questions unless there is no alternative way to resolve the dispute before it. This recognition of the awesomeness of the power of judicial review has well served the Court.

The same essential principle should govern here. If there is a reasonable possibility that Congress can address a problem through legislation, rather than through constitutional amendment, then the legislative alternative should ordinarily be pursued first. Amendment of the U.S. Constitution should be understood as a most solemn act, and it would be unwise in the extreme to pursue it as a first rather than as a last resort.

Thank you.

[The prepared statement of Dean Stone follows:]

Statement of Geoffrey R. Stone
Harry Kalven, Jr. Professor of Law and Dean
The University of Chicago Law School

Hearings on the United States Supreme Court Decision
in Texas v. Johnson Before the United States
Senate Committee on the Judiciary

August 1, 1989

I would like to thank the Members of the Committee for inviting me to appear today to discuss with you the implications of the United States Supreme Court decision in Texas v. Johnson and the various measures that have been proposed in response to that decision.

I

At the outset, I would like to offer two observations, neither of which is directly related to the main thrust of my remarks, but which may nonetheless help to put those remarks in broader perspective.

First, in my judgment, the Court's decision in Texas v. Johnson was premised upon a sound understanding of well-settled principles of First Amendment jurisprudence. Indeed, for those who are familiar with the basic precedents and doctrines that have evolved over the past seventy years, Johnson was hardly surprising. To the contrary, Johnson followed quite sensibly from some of the most basic, most firmly established and most well-reasoned precepts of American constitutional law.

Second, in my judgment, a constitutional amendment to override the decision in Johnson would be unwise in the extreme. As important as the flag may be, and as offensive as desecration of the flag may be, a constitutional amendment to narrow the protections of the First Amendment would be wholly unprecedented in the almost two hundred years of our constitutional history -- and for good reason. The Constitution of the United States is our fundamental charter of government. We should not tamper with it to adjust for what must fairly be understood as matters of only secondary importance in the overall scheme of American government. We have not in the past, and we should not in the present, submit to the temptation to invoke the solemn processes of constitutional amendment to override a decision of the Supreme Court just because it offends -- or even deeply offends -- a substantial majority of our citizens. Such a practice would clutter, trivialize and, indeed, denigrate the Constitution and the broad principles for which it stands. We should recognize the flag issue for what it is -- a profoundly controversial and inflammatory dispute over what in the grand scheme of constitutional government is ultimately a matter of secondary importance. It does not warrant resort to the most profoundly solemn act our nation can pursue -- amendment of the Constitution of the United States.

II

This, then, brings me to the main thrust of my remarks. I would like to focus specifically on the constitutionally of the proposed "Biden-Roth-Cohen Flag Protection Act of 1989," which would prohibit any person knowingly to mutilate, deface, burn, maintain on the floor or ground, or trample upon any flag of the United States. I will divide the inquiry into two parts. First, does the principle on which the Johnson decision was premised invalidate the proposed legislation? Second, is there any other basis upon which one might question the constitutionality of the proposed legislation?

I conclude that Johnson does not directly control the constitutionality of the Biden-Roth-Cohen Act, that there are other possible bases on which one might question the constitutionality of the proposed legislation, but that, in the end, there are at least reasonable grounds to believe that the proposed statute would pass constitutional muster.

A

Let me begin with Johnson. As you know, the Court in Johnson invalidated a Texas statute, which prohibited any person knowingly to desecrate the American flag by defacing, damaging or otherwise physically mistreating it "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action," as applied to an individual who publicly burned the flag as a form of political protest.

To understand Johnson, it is essential to recognize that the decision was premised upon a critical distinction in First Amendment doctrine, for central to the Court's reasoning was the question whether the Texas statute was related or unrelated to the suppression of free expression. A law is "related to the suppression of free expression" if it expressly restricts the communication of particular messages or if it restricts speech because of the reactions of others to the content of the message conveyed. A law is "unrelated to the suppression of free expression" if it applies wholly without regard to the content of the message conveyed.

This is a rather complex and subtle distinction, but it is central to our First Amendment jurisprudence, and it may help if I offer a few illustrations. A law that prohibits any person to display a sign in the Senate gallery that criticizes a member of the Senate is "related to the suppression of free expression" because it expressly restricts the communication of a particular message -- in this case, the criticism of Senators. A law that prohibits any person to display a sign in the Senate gallery that may offend members of the Senate is also "related to the suppression of free expression" because, although it is not directed against the communication of any particular message, it will be applied to some speakers and not others depending upon the reaction of persons -- in this case members of the Senate -- to the content of the message expressed. Finally, a law prohibiting any person to display a sign or any other object in the Senate gallery that might block the view of spectators is "unrelated to the suppression of free expression" because it is not directed at speech, it applies to speakers and non-speakers alike, and it operates wholly without regard to the content of any particular message.

As the Court observed in Johnson, it is well-settled that laws that are "related to the suppression of free expression" are especially problematic under the First Amendment, for by restricting only some messages and not others such laws are especially likely to distort the substantive content of public debate and to mutilate the thought processes of the community. Such laws are thus presumptively unconstitutional.

In Johnson, the Court quite correctly recognized that the Texas statute was related to the suppression of free expression. As the Court explained: "The Texas law is . . . not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others." Thus, "[w]hether Johnson's treatment of the flag violated Texas law depended on the likely communicative impact of his expressive conduct." Citing more than a dozen precedents, the Court observed that "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." The Court therefore concluded that, in such circumstances, "the restriction on Johnson's expression is content-based" and must thus be held unconstitutional unless the state's interest can survive "'the most exacting scrutiny.'"

The key point, then, is this: the decision in Johnson was expressly predicated on the Court's conclusion that the Texas law was "related to the suppression of free expression." The Court did not hold that there is an inviolable First Amendment right to burn the American flag as a means of political protest, as such. Rather, the Court held only that the specific Texas flag desecration statute before it was an unconstitutional means of regulating such conduct. Indeed, as the Court itself emphasized, it is not simply the "nature of the expression," but also "the governmental interest at stake" and the nature of the regulation that help "to determine whether a restriction on . . . expression is valid."

This is a critical distinction, and a few examples may again help to clarify. Consider the situation of an individual who is convicted of burning an American flag in public as a means of political protest in violation of a city ordinance prohibiting any person to make an open fire in a public place. Although Johnson invalidated the Texas flag desecration statute, it tells us little, if anything, about the constitutionality of this conviction, for unlike the Texas statute, our hypothetical open fires ordinance does not turn on communicative impact, is unrelated to the suppression of free expression, is not content-based and need not be subjected to "the most exacting scrutiny." In short, the constitutionality of the open fires law is simply not governed by Johnson.

Let me offer just one further illustration. There can be no doubt that the Supreme Court would uphold a statute prohibiting any person to deface the Lincoln Memorial, even as applied to an individual who scrawled politically-oriented graffiti on the Memorial. On the other hand, there can also be no doubt that, on the basis of the very same principles invoked in Johnson, the Court would invalidate a statute prohibiting any person to write "any message critical of the United States" on the Lincoln Memorial. Although the speech in the two cases is identical, the first statute is content-neutral, unrelated to the suppression of free expression and constitutional, whereas the second statute, like the Texas law invalidated in Johnson, is content-based, related to the suppression of free expression and violative of the First Amendment.

With this understanding of Johnson in mind, I would like to turn now to the Biden-Roth-Cohen Flag Protection Act of 1989, which would prohibit any person knowingly to mutilate, deface, burn, maintain on the floor or ground, or trample upon the flag of the United States. It is essential to note that, unlike the Texas law invalidated in Johnson, the proposed legislation does not refer to "desecration" and does not turn in any way on whether the proscribed conduct "will seriously offend" others. Indeed, the proposed legislation applies to the individual who burns a flag in private to ignite a fire in his fireplace as well as to the individual who burns a flag in public to protest government policy. The proposed legislation applies without regard to whether the conduct takes place in public or in private, without regard to whether it is undertaken for expressive or for other purposes, without regard to whether it offends others, and without regard to the particular message any individual may seek to convey.

Unlike the Texas law invalidated in Johnson, the proposed legislation does not turn on the communicative impact of the prohibited conduct, it is not content-based, it is not directly related to the suppression of free expression and its constitutionally is thus not controlled by the principles that quite correctly dictated the outcome in Johnson. Put simply, the decision in Johnson v. Texas does not of its own force necessarily invalidate the Biden-Roth-Cohen Flag Protection Act of 1989.

B

This is not to say, however, that the proposed legislation is necessarily immune to constitutional challenge. To the contrary, there are at least three possible grounds on which one might question the constitutionality of the Biden-Roth-Cohen Act, and I would like briefly to address them.

First, even if the proposed legislation is understood to be unrelated to the suppression of free expression and neutral with respect to content, it may still violate the First Amendment as an impermissible content-neutral restriction of speech. To conclude that a law is unrelated to the suppression of free expression and neutral as to content may immunize it from the "most exacting scrutiny" required of almost all content-based restrictions, but it does not remove it from constitutional challenge entirely. To the contrary, as the Court has long-recognized, even content-neutral laws may be unconstitutional if their restrictive impact on the opportunities for free expression outweighs the legitimate governmental interests that they serve.

For example, the Court has held that a law prohibiting any person to distribute leaflets in public violates the First Amendment because the impact of such a law on the opportunities for free expression outweighs the importance of the government's interest in reducing litter. See Schneider v. State, 308 U.S. 141 (1943). In general, however, the Court tends to apply a relatively deferential standard of review in cases involving content-neutral restrictions, especially where, as is true of the the proposed legislation, the restriction has only an incidental effect on speech and leaves open many alternative avenues through which speakers may express their message. See generally Geoffrey R. Stone, Content-Neutral Restrictions, 54 U Chi L Rev 46 (1987).

The closest analogy is United States v. O'Brien, 391 U.S. 367 (1968), in which the Court upheld a federal statute prohibiting any person to forge, alter, knowingly destroy or knowingly mutilate a draft card, as applied to an individual who publicly burned his draft card as an act of political protest. Noting that the statute was designed to facilitate the administration of the selective service laws, that it had only an incidental effect on speech, that it was content-neutral and did not turn in application on communicative impact, that it was unrelated to the suppression of free expression, and that it did not significantly interfere with the ability of speakers to communicate their opposition to the draft by other means, the Court held that the challenged law was constitutional because it reasonably furthered a substantial governmental interest.

Assuming that the government's interest in protecting the physical integrity of the American flag is a similarly substantial governmental interest, a question I will come to in a moment, O'Brien seems to me strongly to suggest that, if the proposed legislation is understood to be content-neutral and unrelated to the suppression of free expression, it too would in all likelihood withstand content-neutral review.

A second possible objection to the proposed legislation turns on the issue of impermissible legislative motivation. I have no doubt that if the Biden-Roth-Cohen Flag Protection Act of 1989 is nothing more than a cynical effort to circumvent the decision of the United States Supreme Court in Johnson and to suppress the use of the American flag for the expression of ideas that are offensive to the American people, you should think not twice, but three times before you support this legislation. Indeed, in my judgment, a Member of Congress who supports this legislation for such reasons would violate the oath of office.

Perhaps ironically, then, if the proposed legislation were in fact to be enacted for such constitutionally impermissible reasons, the Court would not necessarily invalidate it on that basis. To the contrary, although the Court has often inquired into the motivation underlying executive and administrative decisions, and occasionally has even invalidated otherwise constitutional government actions on this basis, see, e.g, Keyes v. School District No. 1, 412 U.S. 189 (1973); Yick Wo v. Hopkins, 118 U.S. 356 (1886), it has generally been reluctant to inquire into the motivation underlying legislative actions.

In O'Brien, for example, the Court, largely for prudential reasons, declined to inquire into legislative motivation to determine whether the actual purpose of the draft card statute was not to facilitate the administration of the draft but, rather, to punish those individuals who opposed the draft by burning their draft cards. If this aspect of O'Brien governs, the Court would be unlikely to inquire into the constitutionality of the motivations underlying this legislation as well. I should note, however, that at least in the religion area, the Court in recent years has been increasingly willing to invalidate legislation because of constitutionally impermissible legislative motivation, and it is at least possible that the Court will eventually extend these precedents to the free expression area as well. See, e.g., Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980).

This, then, brings me to the third and final possible objection to the proposed legislation. The issue may be stated as follows: What, precisely, is the purpose of this legislation? If it is not designed merely to circumvent Johnson and to suppress the use of the flag for the expression of offensive and unpatriotic opinions, what is it designed to do? Is there, indeed, any legitimate justification for this legislation that is in fact unrelated to the suppression of free expression?

The simple answer, of course, is that this legislation is designed not to censor critics of the flag or of the nation, but to protect the physical integrity of the flag itself. It is designed, in other words, to preserve the flag as an unalloyed symbol of nationhood and national unity and to prevent any physical damage to the flag that might dilute its symbolic power.

It is not, however, that simple, for as the Court intimated in both Johnson and Spence v. Washington, 418 U.S. 405 (1974), that interest may itself be directly related to the suppression of free expression. This is so for at least two reasons. First, if the purpose of the legislation is to preserve the symbolic value of the flag as an expression of national unity, it would seem that the only acts of physical impairment that would actually undermine that purpose are those acts that impair the physical integrity of the flag in order to convey a different and inconsistent message. And if that is the case, it is difficult to see how this legislation is unrelated to the suppression of free expression or, indeed, how this legislation can rationally be applied to individuals, like the individual who burns a flag to ignite a fire in his fireplace, whose physical impairment of the flag does not threaten its expressive value.

Second, if this is the purpose of the law, its goal is essentially to protect and to promote the flag as a form of governmental speech. In effect, the legislation prohibits anyone to "interrupt" the government's message by impairing the physical integrity of the flag. This, too, raises an interesting question. May the government constitutionally prohibit the interruption of its "speech," while not providing similar protection to the speech of others -- for example, by prohibiting the physical impairment of the Nazi or Communist flags as well? See John H. Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv L Rev 1482, 1503-08 (1975). These are puzzling and, as yet, unresolved questions.

It may be, however, that I have defined the government's interest too narrowly. Perhaps the purpose of this legislation is not to preserve the value of the flag as an unambiguous symbol of national unity but, rather, to establish the flag, in the words of the Texas statute, as a "venerated object." Certainly there are religious groups which proscribe the physical impairment of venerated objects without regard to either the expressive purpose of the object or the expressive intent of the individual who defaces it. But may the United States government constitutionally declare the American flag a "venerated" object? Here, again, we are in esentially unexplored territory.

In my judgment, these are quite subtle and complex issues on which reasonable minds can and will differ. They were not resolved in Johnson, and they have not been resolved in any other decision of the Court. Accordingly, I cannot say -- and I do not think anyone else can fairly say -- that the Biden-Roth-Cohen Flag Protection Act is necessarily constitutional or necessarily unconstituional under existing law. There are at least reasonable grounds to believe, however, that the proposed legislation might be upheld by the Supreme Court.

III

I would like to conclude with two final observations. First, although the proposed legislation does not necessarily violate the First Amendment, I do not think it reflects wise public policy. To avoid the constitutional objections emphasized in Johnson, the proposed legislation reaches private, nonexpressive physical impairments of the flag as well as public, expressive impairments. But while this broadening of the prohibition may mitigate some of the constitutional objections, it poses other problems of its own. What of the books, newspapers and magazines that contain depictions of the flag. Is it now to be a crime to "trample upon" our newspapers? And what of the small plastic or cloth flags commonly purchased at circuses, rodeos and on the Fourth of July. Is it now to be criminal, even in the privacy of the home, not to treat these as venerated objects? Can we sensibly carry the law to such lengths?

Moreover, and more important, the act of burning the American flag, heinous though it may be -- indeed, precisely because it is heinous -- is an extraorinarily powerful means of expressing one's profound disenchantment with national policy. If this legislation is enacted and upheld, it will effectively eliminate this means of expression. This would not, in my judgment, make this a better or a stronger society. As Justice Kennedy observed in Johnson, "it is poignant but fundamental that the flag protects those who hold it in contempt." There is a powerful lesson there that we should not rush to forget.

Second, there is no doubt in my mind that given a choice between the proposed legislation and a constitutional amendment to override Johnson, the legislation is in every respect the more sound and the more responsible route. The Supreme Court has long been guided by the principle that it will not address constitutional questions unless there is no alternative way to resolve the dispute before it. This recognition of the awesomeness of the power of judicial review has well-served the Court.

The same essential principle should govern here. If there is a reasonable possibility that Congress can address a problem through legislation rather than through constitutional amendment, the legislative alternative should ordinarily be pursued first. Amendment of the United States Constitution should be understood as a most solemn act. It would be nothing short of irresponsible to pursue it as a first, rather than as a last, resort.

The **Chairman**. Thank you very much, Dean.

I have a very important question. How old are you?

Dean **Stone**. Forty-two. How old are you?

The **Chairman**. I am 46, and I am impressed. I can understand being elected Senator at 29, but it is hard to understand being dean of such a prestigious law school at 42. But you have demonstrated why you are.

Let me ask you this first. Several witnesses here today in their more elaborate written testimony as well as their oral testimony—and I must tell you I can't recall whether or not Judge Bork because of the limited time he had spoke to it or whether I read it in his statement, but it is clear that Mr. Barr spoke to this issue—have taken the view that the only, and I repeat only, conceivable reason the Government would or could choose to protect the flag is the suppression of expression. And, as support for this proposition they cite the majority opinion in *Texas* v. *Johnson* in several respects, but one in particular they cite is where they say it is a symbol "pregnant"—where the Court says the flag is "pregnant with content," and thus the Government's interest in preserving as a symbol is inherently related to expression.

Now I think I know the answer to this, but I want it on the record. Do you agree with that view expressed by Mr. Barr and I believe Judge Bork, but don't hold me to that. I can't recall who else expressed that view. But at any rate, I know Mr. Barr said it.

Do you agree with the view expressed by Mr. Barr? And if so, why? And if not, why not?

Senator **Humphrey**. Mr. Chairman. I beg Professor Stone's pardon. There is a vote under way. I am going to go and vote and, frankly, I am not coming back, with all due apologies to Dean Griswold and Mr. Cooper.

The **Chairman**. OK. I will go and vote and I am coming back. But I understand that there are other things the Senator may have to do. But if you could answer that question before we leave.

Dean **Stone**. Sure. I do not agree with that position. Mr. Barr and whoever else has taken the position I think confuses "related to expression of the Government" and "related to expression of the citizenry." Surely protection of a symbol, the flag of the United States, is related—insofar as the purpose is protecting the symbol, is related to the expression of the Government. But that is not what the doctrine "related to the suppression of free expression" is about. That is about expression of individuals that is being suppressed by the Government, and in that sense I think Mr. Barr is confusing——

The **Chairman**. Could you repeat that again now?

Dean **Stone**. Sure.

The **Chairman**. I want to make sure I understand it.

Dean **Stone**. Sure.

The **Chairman**. I want to make sure it is clearly on the record, the distinction.

Dean **Stone**. The protection of the flag or any other symbol of the Government, protection by the Government of that symbol is related to expression in the sense that it relates to the expression of the U.S. Government insofar as the symbol is the expression of the United States.

But to protect the Government's own expression is not necessarily to suppress the expression of anyone else. And so I think what Mr. Barr is doing is confusing "related to expression," meaning the Government's own expression, with the key constitutional question, which is "related to the suppression of expression," which means suppression of the expression of citizens, which is a very different problem.

Professor Tribe made the point that the protection of Government speech or symbols in itself is not necessarily a suppression of the speech of any citizens. That is a more complicated question.

The CHAIRMAN. Now you say that the JOHNSON case, *Texas* v. *Johnson*, in and of itself does not invalidate Biden-Roth-Cohen, the statute.

Dean STONE. Correct.

The CHAIRMAN. Then you go on, and I think you stated very clearly—you come up with several theories upon which it might be invalidated on constitutional grounds not expressed in, not laid out in, not discussed in the *Johnson* case.

Dean STONE. Not relied upon in the *Johnson* case.

The CHAIRMAN. Not relied upon, I should say. That is it. Thank you.

Now could you speak for a moment to what dangers, because you are clearly strenuously opposed to the amendment by your statement——

Dean STONE. Yes.

The CHAIRMAN. Could you speak to what dangers might—how can I phrase it? In my exchange with Professor Tribe, I said it seems to me that what—the second policy argument by the administration against the Biden amendment is that Biden (a) is unconstitutional. They make a legalistic argument a constitutional argument, and then they say there is a policy argument. You really don't separate the good guys from the bad guys, Biden, and we want to be able to do that.

Now would you speak to that issue for a moment to the extent that you believe, if you do, that that objective impacts upon, impinges, or limits the first amendment?

Dean STONE. That objective, as the Court held in *Johnson,* is clearly incompatible with the first amendment. And, as Professor Tribe said, there is no way you can achieve that objective; that is, the objective that Mr. Barr and Mr. Cooper's statements seek to pursue, through a statute. That is what *Johnson* tells us. That is unambiguous.

The CHAIRMAN. Can you think of any time in our history when we have attempted by amendment, constitutional amendment, in the Congress or whether it has gotten out to the States, to do that, and that is change the meaning of the first amendment?

Dean STONE. The closest analogy, which did not get out of Congress, had to do with the efforts after the Supreme Court decision in *England* v. *Vitali,* which is the school prayer decision in which this happened. This same thing happened in 1961, and Congress at that time had the good judgment, as I assume it will again now, not to attempt to amend the Constitution to overrule the school prayer decision, although the situation was in many ways a carbon copy with the one we are dealing with today.

The **Chairman**. That related to free expression of religion.

Dean **Stone**. That related to freedom of religion.

The **Chairman**. Freedom of religion. But have there been any that relate specifically to the speech that you can think of?

Dean **Stone**. None that I am aware of.

The **Chairman**. I am so embarrassed to have such a distinguished group of people to have to keep interrupting, but as you know, I have just been passed a note, there are 4 minutes left for me to go and cast my vote. I do not want to keep you if it truly—I mean, if it makes it close to impossible for you to get home. I have a few more questions but I can submit them to you in writing.

Dean **Stone**. That would be fine.

The **Chairman**. Would that be preferable from your perspective?

Dean **Stone**. Certainly.

The **Chairman**. All right. Well, I will do that, and I thank you very much for your testimony. And again, depending on your schedule, I may want to—the committee may want to ask you back. I think everyone is being truly educated by this debate that has taken place over the last month on this issue. I think opinions are changing and moving. I don't mean the public, I mean people who are trying to focus on the constitutional issues involved here.

Dean **Stone**. Well, I would be delighted to come back if the committee thinks it is useful.

The **Chairman**. OK. I thank you very, very much.

[The questions of Dean Stone follow:]

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Office of the Dean

August 15, 1989

Senator Joseph R. Biden, Jr.
United States Senate Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Senator Biden:

I have attempted below to answer the written questions from you and Senator Grassley arising out of my testimony at the August 1 hearing:

Questions from Senator Biden:

Question 1: In none of the four cases -- *Street v. New York*, *Smith v. Goguen*, *Spence v. Washington* or *Johnson v. Texas* -- has the Court addressed the constitutionality of a "flat ban on destroying the flag." In *Street*, the Court invalidated a statute that prohibited any person to speak contemptuously about the flag. In *Smith*, the Court invalidated a statute that prohibited any person to treat the flag contemptuously. In *Spence*, the Court invalidated a flag "misuse" statute that prohibited the "exhibition or display" of any flag to which was attached "any word, figure, mark, design, drawing or advertisement." And in *Johnson*, the Court invalidated a statute that prohibited any person to "desecrate" a flag "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." None of these statutes constituted a "flat ban on destroying the flag" that is broadly applicable to non-expressive as well as expressive activities.

The question whether the Court has "held that the First Amendment includes a general right to burn the flag" is somewhat off-the-mark. The Court has held that the burning of an American flag for expressive purposes can constitute "speech" within the protection of the First Amendment. That does not mean, however, that such speech can never be regulated. The permissible limits on government regulation of speech turn not only on the nature of the speech, but on the nature of the regulation as well. For example, the advocacy of the election of a particular presidential candidate is surely "speech" within the protection of the First Amendment, but there is no "general right" to make such a speech with a loudspeaker at 2:00 in the morning in a residential neighborhood. More to the point of flag burning, the First Amedment would clearly invalidate a law prohibiting any person to urinate on a public building "as a symbol of opposition to national policy," but the government could clearly prohibit any person to urinate on a public building regardless of purpose, even as applied to an individual who did this in symbolic protest of national policy. In short, the decisions in Street, Smith, Spence and Johnson invalidated various restrictions on the expressive act of burning an American flag, but they do not establish a "general right" to burn the flag without regard to the nature of the restriction imposed.

Question 2: The Supreme Court has never applied the establishment clause decisions to the free speech area. O'Brien remains the governing free speech precedent. Moreover, even if the Court were to inquire into the motivation underlying enactment of the Biden-Roth-Cohen Flag Protection Act, there is no reason to assume that the motivation is impermissible. To the contrary, the Court in Spence assumed arguendo the validity of the government's interest in protecting the physical integrity of the flag, and if that is in fact the purpose of this statute it could well pass constitutional muster even if the Court were to overrule this aspect of O'Brien. On the other hand, if the purpose of this legislation is to circumvent Johnson in order "to suppress the expression of certain views," the statute should not be enacted, whether or not the Court would overrule this aspect of O'Brien. As I observed in my testimony, a member of Congress who supports this legislation for that reason would, in my judgment, violate the oath of office.

Question 3-A: I do not agree with Mr. Barr that the Court "will necessarily apply strict scrutiny to the Biden-Roth-Cohen legislation." First, as I made clear in my testimony, the proposed legislation poses a very different question than the Texas statute invalidated in Johnson. Unlike the Texas statute, the proposed legislation is content-neutral, does not turn on "communicative impact," is "unrelated to the suppression of free expression," and does not trigger the "bedrock" First Amendment principle that government may not prohibit the expression of an idea because it is offensive to others. In short, the invocation of strict scrutiny in Johnson was based on factors that simply are not present in the proposed legislation.

Second, the law invalidated in Spence dealt explicitly with the "exhibition or display" of the American flag. It was thus "directly related to the suppression of free expression." That is not the case with the Biden-Roth-Cohen legislation, which is much broader than the flag misuse statute invalidated in Spence and is not expressly directed at acts of expression.

Third, contrary to Mr. Barr's assumption, the Court in Spence did not necessarily apply "strict scrutiny." To the contrary, the Court held only that because the flag misuse statute was directly related to the suppression of free expression, the extremely deferential standard of O'Brien was inapplicable. The Court did not hold, however, that strict scrutiny was the appropriate standard. Indeed, the Court emphasized in Spence that the appellant "did not permanently disfigure the flag or destroy it," a fact that would hardly have mattered under strict scrutiny.

Mr. Barr seems to assume that there are only two First Amendment standards -- deferential review and strict scrutiny. In his view, there is a sharp dichotomy in First Amendment doctrine: laws that are "related to free expression" trigger strict scrutiny; laws that are "unrelated to free expression" trigger only deferential review. That is simply not the case. Indeed, many laws -- such as those banning speeches in the Senate gallery or prohibiting the use of loudspeakers in residential neighborhoods at night -- are "directly related to the suppression of free expression," but do not trigger strict scrutiny.

Mr. Barr's testimony is apparently premised on a confusion between the "related to the suppression of free expression" doctrine and the "content-based/content-neutral" distinction. The "related to the suppression of free expression" doctrine was established in O'Brien to deal with the special problem of laws that have only an incidental effect on free expression. O'Brien held that such laws, which are "unrelated to the suppression of free expression," should be tested by a highly deferential standard of review. O'Brien did not hold, however, that laws that directly regulate speech, and are thus "related to the suppression of free expression," must necessarily be tested by strict scrutiny. In fact, the Court tests laws that are "related to the suppression of free expression" by a broad range of different standards, depending primarily upon whether they are content-based or content-neutral.

Mr. Barr's understanding might be correct if "related to the suppression of free expression" is taken to refer only to those laws that turn on "communicative impact." There is, indeed, some confusion in the caselaw and the literature on this point. On this view, a law that expressly regulates leafleting to prevent litter would not be deemed "related to the suppression of free expression" because it does not turn on the "communicative impact" of speech. On this view of the doctrine, it is probably true that any law "related to the suppression of free expression" would trigger strict scrutiny, for under this definition all laws that are "related to the suppression of free expression" are necessarily content-based. That does not strengthen Mr. Barr's position, however, for the Biden-Cohen-Roth legislation clearly does not turn on "communicative impact" and, on this view of the doctrine, would clearly be "unrelated to the suppression of free expression."

Question 3-B: A law designed to protect the physical integrity of "certain" books would be struck down if the books protected by the law were selected because of their content. On the other hand, a law that prohibited any person to deface or destroy "any" book would either be deemed "unrelated to the suppression of free expression" and thus upheld under O'Brien, or content-neutral and thus constitutional if the law serves a legitimate governmental interest. Mr. Barr's suggestion that the second law would trigger strict scrutiny because it is "related to expression" is clearly erroneous. This suggestion is apparently premised on a confusion of two quite distinct concepts -- "related to expression" and "related to the suppression of expression." The law protecting all books is clearly "related to expression" in the sense that it protects books, but that in itself would have no impact on the standard applied. The government is surely entitled to protect and promote free expression (including the preservation of books), so long as it does not do so in a manner that itself violates the First Amendment. Properly understood, the O'Brien doctrine is concerned, not with laws "related to expression," but with laws "related to the suppression of free expression," a concept that would be relevant to the second law only if its purpose was to prohibit the destruction of books as a means of communication. But if the purpose behind the law was simply to protect books from destruction, it would almost surely be constitutional, even as applied to an individual who burned a book as a means of expression. Cf. O'Brien.

Question 4-A and B: The Court has rarely considered disparate impact in free speech cases. Your analogy to O'Brien is quite apt, and the availability of "alternative avenues of communication" does, indeed, seem to be the explanation for the Court's approach. For a fuller discussion, see Geoffrey R. Stone, Content-Neutral Restrictions, 54 U Chi L Rev 46, 81-86 (1987).

Question 5: The concept of an "attempt to reverse a constitutional decision by statute" is essentially incoherent. Congress cannot "reverse" Johnson by statute. As I understand it, the Biden-Roth-Cohen legislation represents an effort to cure the constitutional defect that was present in the Texas statute. This is not an "attempt to reverse Johnson." On the other hand, if the proposed legislation is merely a pretext designed to circumvent Johnson in order to suppress certain offensive or unpopular ideas, it should not be enacted. (See my answer to Question 2, above.)

Questions from Senator Grassley:

Question 1: This is a fundamental question that goes to the very heart of the First Amendment. The answer is that unless those who would subvert the Constitution through unlawful means pose a "clear and present danger," the First Amendment demands that we tolerate their expression. As Justice Holmes so eloquently put the point in his seminal dissenting opinion in *Abrams v. United States*, 250 U.S. 616 (1919), as long as the First Amendment is part of our Constitution, we must "be eternally vigilant against attempts to check the expression of opinions that we loath and believe to be fraught with death." That, indeed, is the essence of our constitutional system of government.

Question 2: The government ordinarily may prohibit acts of "disrespect, undisciplined behavior, and violence" so long as it aims at the acts themselves, rather than at the message. On the other hand, if the regulation is aimed at the message, rather than at the acts, the regulation is ordinarily invalid. For example, the government may prohibit any person to urinate on a public building, but it may not prohibit any person to urinate on a public building "as a sign of disrespect for government." This is, in simple form, the essential difference between the proposed Biden-Roth-Cohen legislation and the Texas statute invalidated in *Johnson*.

Question 3: The government may, consistent with the First Amendment, prohibit the "delivering of a political message over television in obscenities" and the expression of "a political viewpoint from a sound truck at two o'clock in the morning in a residential neighborhood." Indeed, the government may often (though not always) regulate the "means of expression," but it may not attempt to regulate the particular political message conveyed. Thus, the government cannot constitutionally prohibit the delivering of "offensive" or "unpatriotic" political messages over television in obscenities or the expression of "offensive" or "unpatriotic" political viewpoints from a sound truck at two o'clock in the morning in a residential neighborhood. This was essentially the problem with the law invalidated in *Johnson* -- it protected the flag from physical abuse *only* when the flag was damaged in such a way as to "offend" others. (I have not commented on the "making a point by engaging in indecent public behavior" example because the concept is too vague to pass constitutional muster.)

Question 4: The logical extension of *Johnson* is *not* that the government cannot prohibit "public nudity" or "sexual acts done in public" if "these actions are accompanied by some message or protest." *Johnson* does not in any way suggest that government cannot regulate the non-expressive attributes of conduct merely because an individual chooses to use the conduct for expression. It holds only that government cannot regulate the *expressive* aspects of such conduct. Thus, although an individual who engages in public nudity to protest conventional moral standards is engaged in "speech," the government can prohibit such speech if its purpose is "unrelated tc the suppression of free expression." On the other hand, if the government prohibits public nudity only if it is done to express a point of view, or to express an "offensive" or "unpatriotic" point of view, the law will clearly violate the First Amendment. That is the meaning of Johnson.

Question 5: The Supreme Court has never addressed this issue. I have no confident answer myself. It is an interesting, controversial and open question. Such a "declaration" would surely be troubling, but it would not necessarily be unconstitutional. Consider the bald eagle example posed during the hearings on August 1. I would be hard pressed to explain why the government could not constititionally prohibit any person to kill a bald eagle because the bald eagle is the "symbol" of the United States, wholly apart from the bald eagle's status as an endangered species.

Question 6: I'm not sure I understand this question. I am sure, however, that the Supreme Court does not generally "need to follow . . . community standards" in constititional adjudication. Indeed, such a general approach would be fundamentally at odds with the very idea of judicial review. On the other hand, there are certainly some circumstances in which "community standards" play an important role, such as in the definition of obscenity and of "reasonable expectations of privacy."

Question 7: This argument is without merit. One could have made the same argument about innumerable Supreme Court decisions, including those dealing with reapportionment, libel, school prayer, racial segregation, and the like. Consider, for example, an amendment that "merely allows" the states to segregate their schools or malapportion their legislatures. This argument proves everything and, thus, nothing.

Question 8: This is essentially the same point as that addressed in question 7. The "argument" is mere rhetoric. It is without substance.

Question 9: One premise of this question -- that the Biden-Roth-Cohen legislation would be unconstitutional as "applied to political expression such as the Gregory Johnson incident" -- is open to question. The main thrust of my testimony before the Committee was that the proposed legislation would not "necessarily" be unconstitutional and that there is at least a "reasonable possibility" that the Court would uphold the legislation, even as applied to someone like Johnson.

The other premise of the question -- that "most people do not want to criminalize" private acts that impair the physical integrity of the flag -- poses an interesting question. It is a core principle of constitutional analysis that one way to test the seriousness of the government's interest is to see whether it is consistently applied. The reluctance to prohibit private, non-expressive acts that burn, trample, tear or otherwise mutilate the American flag suggests that there is no serious commitment to protecting the physical integrity of the flag and that the government's real interest is in punishing those individuals who use the flag to express unpatriotic or otherwise offensive views. If that interest is, in fact, at the heart of the matter, the decision in Johnson was clearly correct and Congress should recognize that it cannot achieve its objective for the very good reason that it should not achieve it.

Question 10: Government can clearly make it unlawful for any person to deface or to destroy the property of another, even as applied to the examples posed in this question. What it cannot do is prohibit any person to deface the property of another "with a swastika" or "with the letters KKK." Such laws would violate the First Amendment requirement of content-neutrality. (See my answers to Senator Grassley's questions 2, 3 and 4, above.)

Question 11: Government may prohibit any person to deface public or private property, so long as it does not direct the prohibition specifically at expression or at "offensive" expression. On the other hand, a law that is otherwise invalid under the First Amendment ordinarily will not be saved by the claim that it "intentionally inflicts mental distress" on others. Indeed, in Hustler Magazine v. Falwell, 485 U.S. 46 (1988), Chief Justice Rehnquist observed for a unanimous Court that such a standard "has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." It would thus run "afoul of our longstanding refusal to allow" expression to be restricted "because the speech in question may have an adverse emotional impact on the audience."

Question 12: This argument is no more persuasive in this context than if offered in defense of racial segregation, coerced confessions, compulsory school prayer or laws against blasphemy.

Question 13: The scenario painted by Judge Bork is certainly possible, but it is by no means inevitable. As I suggested in my testimony, amendment to the United States Constitution is a drastic step that should be taken only if Congress has first exhausted all reasonable legislative solutions to the problem.

Question 14: I do not share the premise of the question -- that Johnson must be "remedied." To the contrary, in my judgment Johnson represented the sound application of well-established and well-founded principles of First Amendment jurisprudence. However, on the view that Johnson does require a "remedy" by constitutional amendment, the language proposed by President Bush would serve the purpose. Unfortunately, it would also trivialize the Constitution and betray a core principle of our constitutional heritage.

If I can be of any further assistance in this matter, please feel free to call on me at any time.

Sincerely yours,

Geoffrey R. Stone

QUESTIONS FROM SENATOR BIDEN FOR DEAN STONE

QUESTION 1:

FOUR TIMES DURING THE PAST 20 YEARS THE SUPREME COURT HAS REVIEWED CRIMINAL CONVICTIONS FOR BURNING, DEFACING OR MISUSING AN AMERICAN FLAG. EACH TIME THE COURT HAS REVERSED THE CONVICTION ON FIRST AMENDMENT GROUNDS.

DID THE LAWS STRUCK DOWN IN ANY OF THOSE FOUR CASES IMPOSE A FLAT BAN ON DESTROYING THE FLAG, AND IN ANY OF THOSE DECISIONS -- TEXAS V. JOHNSON BEING THE MOST RECENT -- HAS THE SUPREME COURT EVER HELD THAT THE FIRST AMENDMENT INCLUDES A GENERAL RIGHT TO BURN THE FLAG?

QUESTION 2:

DEAN STONE, THE ARGUMENT HAS BEEN MADE THAT EVEN IF CONGRESS TALKS ABOUT WANTING TO PROTECT THE FLAG, THE SUPREME COURT WILL READ BETWEEN THE LINES, IF YOU WILL, AND CLEARLY RECOGNIZE THAT THE HIDDEN MOTIVATION IS TO SUPPRESS THE EXPRESSION OF CERTAIN VIEWS.

THOSE MAKING THIS ARGUMENT CITE SOME RECENT ESTABLISHMENT CLAUSE CASES IN WHICH THE COURT DID IN FACT SEARCH FOR AN IMPERMISSIBLE MOTIVATION. IN YOUR STATEMENT, YOU NOTED THESE CASES.

HAS THE SUPREME COURT YET APPLIED THE PRINCIPLE IN THE ESTABLISHMENT CLAUSE CASES TO THE FREE SPEECH AREA?

QUESTION 3:

PART A:

IN HIS TESTIMONY ON AUGUST 1, WILLIAM BARR ARGUED THAT THE SUPREME COURT WILL NECESSARILY APPLY "STRICT SCRUTINY" TO THE BIEEN-ROTH-COHEN LEGISLATION. SPECIFICALLY, MR. BARR SAID:

> "IN TWO SUCCESSIVE CASES, SPENCE AND JOHNSON, THE COURT HAS SAID THAT THE GOVERNMENT'S INTEREST IN PROTECTING THE FLAG AS A SYMBOL IS NECESSARILY AND INHERENTLY RELATED TO EXPRESSION, AND CONSEQUENTLY, A RULE BASED UPON A DESIRE TO PROTECT THE FLAG AS A SYMBOL, WILL FALL UNDER STRICT SCRUTINY, AND IT WILL FALL BECAUSE THE GOVERNMENT'S INTERESTS ARE NOT COMPELLING ENOUGH."

DO YOU AGREE WITH MR. BARR THAT THE COURT WILL NECESSARILY APPLY STRICT SCRUTINY TO THE BIDEN-ROTH-COHEN LEGISLATION? IF NOT, WHY NOT?

PART B:

IN HIS TESTIMONY, MR. BARR CITED IN SUPPORT OF HIS ARGUMENT A LAW DESIGNED TO PROTECT CERTAIN BOOKS BECAUSE THE GOVERNMENT WANTS TO PROTECT THEIR PHYSICAL INTEGRITY. MR. BARR ARGUED THAT SUCH A LAW WOULD NECESSARILY BE STRUCK DOWN BY THE SUPREME COURT, AND THAT THIS EXAMPLE DEMONSTRATES THAT THE BIDEN-ROTH-COHEN LEGISLATION WOULD ALSO BE STRUCK DOWN.

DO THE SUPREME COURT'S FIRST AMENDMENT DECISIONS SUPPORT THE VIEW THAT SUCH A LAW -- DESIGNED TO PROTECT THE PHYSICAL INTEGRITY OF CERTAIN BOOKS -- WOULD NECESSARILY BE SUBJECT TO STRICT SCRUTINY AND WOULD, FOR THAT REASON, BE STRUCK DOWN?

QUESTION 4:

PART A

DEAN STONE, SOME HAVE ARGUED THAT THE BIDEN-ROTH-COHEN LEGISLATION IS UNCONSTITUTIONAL BECAUSE IT WILL HAVE A DISPARATE IMPACT ON PEOPLE WHO WANT TO EXPRESS DISAGREEMENT WITH GOVERNMENT POLICY. THE QUESTION THEY POSE IS WHO WOULD BURN A FLAG IN SUPPORT OF U.S. POLICY. THEY CONCLUDE THAT MY PROPOSED LEGISLATION WILL THEREFORE HAVE THE SAME EFFECT AS THE CURRENT FEDERAL STATUTE, AND IS NECESSARILY UNCONSTITUTIONAL FOR THAT REASON.

ISN'T IT TRUE THAT THAT SAME ARGUMENT APPLIED TO THE STATUTE AT ISSUE IN O'BRIEN V. UNITED STATES, AND THAT THE COURT PAID NO ATTENTION TO THAT ASPECT OF THE CASE?

PART B:

IS ONE POSSIBLE EXPLANATION FOR WHY THE COURT PAID NO ATTENTION TO THIS IN O'BRIEN -- AND WHY IT MIGHT NOT PAY ANY ATTENTION TO THIS ISSUE IN A CHALLENGE TO THE BIDEN-ROTH-COHEN LEGISLATION -- THE FACT THAT IN BOTH CASES THERE ARE ALTERNATIVE AVENUES OF COMMUNICATION AVAILABLE?

QUESTION 5:

DO YOU AGREE WITH THE ARGUMENT THAT THE BIDEN-ROTH-COHEN LEGISLATION IS AN UNPRECEDENTED ATTEMPT TO REVERSE A CONSTITUTIONAL DECISION BY STATUTE? IF NOT, WHY NOT?

SENATOR CHARLES E. GRASSLEY
QUESTIONS REGARDING S.J. RES. 180 & S. 1338
TO: GEOFFREY R. STONE - DEAN, UNIVERSITY OF CHICAGO LAW SCHOOL
AUGUST 1, 1989

....

** HOW MUCH TOLERANCE DO WE SHOW TO THOSE WHO -- IF THEIR VIEWS WERE TO PREVAIL -- WOULD SHOW US NONE ?

** LET ME ASK YOU A QUESTION THAT A CONSTITUENT OF MINE ASKED ME: DO ALL ACTS OF DISRESPECT, UNDISCIPLINED BEHAVIOR, AND VIOLENCE HAVE TO BE EXCUSED, ACCEPTED, OR TOLERATED AS A RIGHT OF PERSONAL FREEDOM ? IS THERE NO LONGER A RECOGNIZED DIFFERENCE BETWEEN LIBERTY AND LICENSE ?

PROPONENTS OF AN AMENDMENT TO PROTECT THE PHYSICAL INTEGRITY OF THE FLAG MAINTAIN THAT THE FIRST AMENDMENT IS NOT ABSOLUTE AND DOES NOT PROTECT OBSCENITY, LIBEL, 'FIGHTING WORDS', OR STATEMENTS THAT -- BY GIVING AID AND COMFORT TO AN ENEMY -- ARE TREASONOUS.

**** CAN'T THE FEDERAL GOVERNMENT OR A STATE GOVERNMENT CONSTITUTIONALLY PUNISH ACTIONS SUCH AS:**

DELIVERING A POLITICAL MESSAGE OVER TELEVISION IN OBSCENITIES -

OR EXPRESSING A POLITICAL VIEWPOINT FROM A SOUND TRUCK AT TWO-O'CLOCK IN THE MORNING IN A RESIDENTIAL NEIGHBORHOOD -

OR MAKING A POINT BY ENGAGING IN INDECENT PUBLIC BEHAVIOR ?

WHAT IS THE LOGICAL EXTENSION OF THE RATIONALE OF THE COURT'S JOHNSON DECISION - PUBLIC NUDITY OR EVEN SEXUAL ACTS DONE IN PUBLIC, AS LONG AS THESE ACTIONS ARE ACCOMPANIED BY SOME MESSAGE OR PROTEST AGAINST SOCIETY'S MORALS ?

** DOES A CIVILIZED SOCIETY -- BASED UPON COMMUNITY STANDARDS DEMONSTRATED THROUGH CONSISTENT CONDUCT OVER A LONG PERIOD OF TIME -- HAVE THE ABILITY TO DECLARE THAT CERTAIN OBJECTS AND SYMBOLS OCCUPY SUCH A VENERATED STATUS IN THAT SOCIETY THAT THEIR PHYSICAL INTEGRITY CAN BE PROTECTED FROM DESECRATION ?

** DOESN'T THE SUPREME COURT NEED TO FOLLOW THOSE COMMUNITY STANDARDS, RATHER THAN THEIR OWN MORAL, POLITICAL AND AESTHETIC PREFERENCES IN MAKING SUCH DETERMINATIONS ?

SUPPORTERS OF AN AMENDMENT TO THE CONSTITUTION TO MODIFY THE SUPREME COURT'S DECISION IN TEXAS v. JOHNSON, CLAIM -- AMONG OTHER POINTS -- THAT THE PRESIDENT'S AMENDMENT MERELY OVERTURNS "THE COURT'S JUDICIAL AMENDMENT TO THE CONSTITUTION AND SIMPLY PUTS THE LAW BACK WHERE IT WAS THE DAY BEFORE THE DECISION WAS RENDERED."

**** WHAT IS YOUR OPINION OF THE ANALYSIS THAT THE PRESIDENT'S AMENDMENT IS NOT POSITIVE LAW IN THAT IT DOES NOT BY ITSELF PROHIBIT ANYTHING, BUT IT MERELY ALLOWS THE PEOPLE TO ENACT LAWS PROHIBITING FLAG DESECRATION, SOMETHING THAT 48 STATES AND THE FEDERAL GOVERNMENT ALREADY HAD ON THE BOOKS, PRIOR TO THE JOHNSON DECISION, WITHOUT ANY PROTEST FROM CIVIL LIBERTIES GROUPS THAT THESE STATUTES ARE AN INFRINGEMENT ON FIRST AMENDMENT RIGHTS ?**

SUPPORTERS OF A CONSTITUTIONAL AMENDMENT, SUCH AS ROBERT BORK, CONTEND IN PART THAT THE PRESIDENT'S AMENDMENT MAY BE " ... LESS AN AMENDMENT TO THE CONSTITUTION THAN AN AMENDMENT TO THE OPINION OF THE COURT ... "

THEY NOTE THAT CHIEF JUSTICE REHNQUIST'S DISSENT POINTS OUT THAT IN THE PAST, CHIEF JUSTICE EARL WARREN AND JUSTICE HUGO BLACK -- A SELF-DESCRIBED FIRST AMENDMENT ABSOLUTIST -- HAVE VERY STRONGLY ENDORSED THE ABILITY OF THE GOVERNMENT TO ENACT PUNISHMENTS FOR FLAG DESECRATION WITHOUT VIOLATING THE LETTER OR SPIRIT OF THE FIRST AMENDMENT.

** WHAT IS YOUR OPINION THAT THE PRESIDENT'S AMENDMENT IS SIMPLY A "RESTORATION" OF THE CONSTITUTION ?

PROPONENTS OF A CONSTITUTIONAL AMENDMENT TO MODIFY THE SUPREME COURT'S JOHNSON DECISION, CONTEND THAT SIMPLY AMENDING THE FEDERAL STATUTE WILL NOT MODIFY THE COURT'S POSITION.

THEY MAINTAIN THAT THE COURT DECISION MEANS THAT ANY LAW, REGARDLESS OF ITS WORDING, IS UNCONSTITUTIONAL IF APPLIED TO POLITICAL EXPRESSION SUCH AS THE GREGORY JOHNSON INCIDENT.

THAT BY MERELY DELETING THE PROVISIONS "CAST CONTEMPT" AND "PUBLICLY" FROM THE FEDERAL STATUTE MAY APPEAR TO MAKE THE STATUTE MORE NEUTRAL ON ITS FACE, BUT WOULD NOT SAVE SUCH A STATUTE IF IT WERE APPLIED AGAINST GREGORY JOHNSON, WHO ALLEGEDLY BURNED THE FLAG IN POLITICAL PROTEST.

AND FURTHER, THERE IS NO LEGITIMATE INTEREST ADVANCED BY CRIMINALIZING THE PRIVATE BURNING OF A FLAG.

**** PLEASE GIVE YOUR OPINION OF THE ANALYSIS THAT THE EFFECT OF AMENDING THE FEDERAL STATUTE MAY REACH PRIVATE CONDUCT THAT MOST PEOPLE DO NOT WANT TO CRIMINALIZE, WHILE AT THE SAME TIME ENACTING A STATUTE THAT WILL BE HELD UNCONSTITUTIONAL IF IT IS APPLIED TO PUBLIC ACTS OF FLAG BURNING, WHICH MOST PEOPLE APPEAR TO WANT TO CRIMINALIZE ?**

**** WHAT IS YOUR OPINION OF THE OPINION THAT THE RATIONALE IN THE JOHNSON CASE MIGHT ARGUABLY MAKE UNCONSTITUTIONAL ANY ANTI-DESECRATION STATUTE ENACTED TO PREVENT THE SPRAY-PAINTING OF A SWASTIKA ON A SYNAGOGUE OR OF THE LETTERS "KKK" ON A BLACK FAMILY'S HOME, IF THE DESECRATORS CLAIMED TO BE MAKING A POLITICAL STATEMENT AGAINST JEWS OR BLACKS ?**

AMERICANS ARE DEFINATELY OFFENDED BY THE DESECRATION OF CERTAIN OBJECTS AND SYMBOLS IN THE COMMUNITY THAT ARE HELD TO BE IN A GENUINELY VENERABLE STATUS.

PROPONENTS OF AN AMENDMENT TO PROTECT THE FLAG BELIEVE THAT SOCIETY SHOULD BE ABLE TO PUNISH THOSE WHO DESECRATE THESE SYMBOLS AND OBJECTS REGARDLESS OF THE POLITICAL SPEECH THE PERSON WISHES TO CONVEY BY HIS OR HER ACTION.

**** WHAT IS YOUR OPINION OF THE ARGUMENT THAT A DESECRATOR IS "TORTIOUSLY INFLICTING MENTAL DISTRESS ON THE INDIVIDUALS WHO VIEW THE HANDIWORK" AND THAT THE STATE HAS AN INTEREST IN PROTECTING THE PUBLIC AGAINST THE HARM CAUSED BY THE MERE DESECRATION OF SUCH AN OBJECT OR SYMBOL, REGARDLESS OF THE MESSAGE ?**

IN A RECENT COLUMN, L. GORDON CROVITZ DECLARED "THERE IS A PROBLEM WITH A LEGAL DOCTRINE THAT DEPENDS ON WHAT NINE CLOISTERED JUSTICES THINK MAKES THE AVERAGE AMERICAN FIGHTING MAD. THE JUSTICES MIGHT HAVE BEEN WISER TO GIVE MORE CREDENCE TO THE 48 STATE LAWS AND FEDERAL STATUTES THAT PROHIBIT DESECRATION OF THE FLAG, LAWS WRITTEN BY LEGISLATORS WHO THINK BURNING THE FLAG AMOUNTS TO FIGHTING WORDS. WHETHER OR NOT A CONSTITUTIONAL AMENDMENT IS THE PROPER RESPONSE, THE FACT OF PUBLIC OUTRAGE OVER THE FLAG DECISION IS ITSELF GOOD EVIDENCE THAT THE JUSTICES GOT THE LAW WRONG."

** DON'T THE PEOPLE HAVE THE RIGHT TO ENACT SUCH ANTI-DESECRATION STATUTES, LEAVING PROTESTORS TO ENGAGE IN ANY SYMBOLIC SPEECH THEY DESIRE UP TO BUT NOT INCLUDING THE PROHIBITED DESECRATION ?

THE HONORABLE ROBERT BORK - A PROPONENT OF A CONSTITUTIONAL AMENDMENT TO PROTECT THE FLAG - HAS STATED THAT "NO STATUTE CAN BE DRAWN THAT WILL CURE THE PROBLEM CREATED BY TEXAS v. JOHNSON", BECAUSE AMONG OTHER THINGS, "THE IDEA OF A STATUTE CIRCUMVENTING A CONSTITUTIONAL DECISION ... WOULD CONSTITUTE A DANGEROUS EXPEDIENT."

HE HAS ALSO STATED THAT " ... A STATUTORY RESPONSE TO THE JOHNSON CASE WILL PRODUCE DELAY AND NOTHING ELSE."

** WHAT IS YOUR OPINION OF ROBERT BORK'S VIEW OF A STATUTORY CURE TO THE JOHNSON FLAG BURNING CASE, WHICH IS - AMONG OTHER POINTS - THAT:

(1) ANY STATUTE PASSED IN RESPONSE TO THE JOHNSON CASE WOULD BE SEEN AS AN ATTEMPT TO CHANGE THE RESULT OF THAT CASE, NO MATTER HOW NEUTRALLY THE STATUTE IS WORDED,

(2) THE LEGISLATIVE HISTORY OF THE STATUTE WOULD REVEAL THAT IT WAS DESIGNED TO PREVENT THE EXPRESSION OF AN IDEA BY DESECRATING THE FLAG,

(3) CONGRESS COULD ARTICULATE NO REASON FOR PROHIBITING THE DEFACEMENT OR DESTRUCTION OF THE FLAG OTHER THAN THE OFFENSIVENESS OF THE MODE OF EXPRESSION, AND

(4) LOWER COURTS WOULD DECLARE SUCH A STATUTE UNCONSTITUTIONAL BASED UPON THE JOHNSON DECISION, THE SUPREME COURT MIGHT NOT REVIEW THOSE DECISIONS, AND AFTER A PERIOD OF TIME, WE WOULD BE RIGHT BACK WHERE WE ARE TODAY ?

** IS THERE ANY LANGUAGE THAT YOU COULD RECOMMEND TO THE COMMITTEE -- IN THE FORM OF A PROPOSED CONSTITUTIONAL AMENDMENT -- THAT WOULD REMEDY THE JOHNSON DECISION ?

The CHAIRMAN. Now, Mr. Cooper, it takes me about 8 minutes to run over, vote, and run back. You will be on deck, and then we will go to Dean Griswold.

And, Dean Griswold, the idea of keeping you waiting this long is something that when I was in law school I would not even have remotely thought of, and I still shudder slightly to think I am doing it now. But I have no alternative. So I again apologize. A man of your distinction to wait this long is beyond—should be beyond the authority of this committee.

But with that I thank you, Dean Stone. I will be back, Mr. Cooper, very shortly. And, Dean Griswold, I apologize. It should all take about 8 minutes.

[Recess.]

Senator THURMOND [presiding]. The hearing will come to order.

Mr. Cooper, Senator Biden will be back in a few minutes, I am sure, and I have got to go down to the White House. And I thought I would just ask you a few questions. And you can make your main statement after he comes if you want to.

And I want to commend you for your presence here and also thank you for your patience because you have been here all day.

This issue and legislative activities are a direct response to the public's uproar against the *Johnson* decision. If the American people overwhelmingly want to prohibit expressive conduct which desecrates the flag, do you feel that to overturn this decision by an amendment is consistent with proceedures and precedences for amending our Constitution?

STATEMENT OF CHARLES J. COOPER, McGUIRE, WOODS, BATTLE AND BOOTHE

Mr. COOPER. Certainly, Senator Thurmond.

The Constitution contains procedures for its amendment. Article V sets out what is a very arduous, difficult process for amending the Constitution. The people, the American people, have only employed that process 26 times. I think, in my opinion and in the opinion of many, the Supreme Court has amended the Constitution many, many times. But the people have only used the arduous article V process 26 times.

But the process is there. And in cases surpassing overriding importance, as I believe the question of the preservation of the flag as a symbol of our national unity is to most Americans, the constitutional amendment process is entirely legitimate and appropriate.

Senator THURMOND. If the statutory approach is passed and amended to allow some types of flag destruction while prohibiting others, is this exactly what the Supreme Court said was unconstitutional in the *Johnson* decision as contrary to the first amendment?

Mr. COOPER. Yes, sir. As I read the *Johnson* opinion, the Court identified Texas' alleged interest for passing a flag desecration statute, one of which is preserving the symbol of the flag as a symbol of national unity. And it determined that the State's asserted interest in preserving the flag as a symbol of national unity was inescapably related to expression. And for that reason, it had to surpass the most exacting first amendment standards. The Court determined that it could not surpass those standards.

I do believe the legislation that is being advanced here would suffer from the same defect because in the end the interest that I have heard articulated in support of the legislative solutions, and indeed the only interest that I can conceive of that would support any such a measure is preserving the flag as a symbol of national unity. And that would inescapably be related to expression and would actuate the most exacting first amendment standards and I think would imperil any such statute.

Senator THURMOND. Congressman Brooks has a statute and Senator Biden has a statute, and there may be some others. Have you looked into the matter carefully? And do you feel that a statute would accomplish the purpose here? Or do you feel that a constitutional amendment is necessary?

Mr. COOPER. Senator, I have examined Senator Biden's proposed statute. Truthfully I have not examined Congressman Brooks'. I assume, however, that it is quite similar in terms of its language and in terms of the provisions as well as the intent that motivates it. For the reasons I have earlier outlined, I do believe that those statutes would not be consistent with the Supreme Court's teaching in the *Johnson* case, at least not if that teaching was faithfully applied.

Senator THURMOND. Do you know of any kind of statute that could be written that would answer the purpose? From the investigation by the Attorney General and other scholars that the information I had was they felt that a statute could not accomplish the purpose. Therefore, a constitutional amendment was necessary. Is that your view?

Mr. COOPER. Yes, sir, it is.

The only statutory proposals that I have seen would essentially extend the prohibition on flag destruction to all flag destruction, not just destruction or compromising of the flag's integrity that is done in a contemptuous manner. I do believe that those provisions would not be consistent with the Supreme Court's teaching in *Johnson*.

It is conceivable that statutes that would rely upon different government interests than the interest advanced for the Biden proposal, such as the interest in maintaining order or in preventing breaches of the peace are conceivable. But I believe that *Johnson* pretty well forecloses those as well, I think erroneously. But nonetheless, I do think *Johnson* would foreclose those types of provisions as well.

Senator THURMOND. Now, I am sure that proponents of either the statutory approach or the constitutional amendment seek to protect the integrity of the flag as a symbol of our nation. In light of the *Johnson* decision, do you feel the Supreme Court could rule that the statutory approach is indeed neutral in its application and therefore constitutional?

Mr. COOPER. I do not, Senator Thurmond. I agree with the earlier statements made by Mr. Barr of the Justice Department as well as Judge Bork, that critical to any first amendment analysis or examination of a statute in this area would be the interest that the Government sought to accomplish by enacting the statute, the purpose that was to be served.

If the purpose is to preserve the flag's symbolic value, its status as a symbol of national unity and all the things that America stands for, then it is, I believe *Johnson* teaches us, inextricably related to expression. And that conclusion compels the further legal conclusion that the first amendment's most exacting standards would apply to it. And I cannot imagine how the faithful application of *Johnson* would yield a result other than that such a statute would fall.

Senator THURMOND. Senator Dole and Senator Dixon and I and about 50 other Senators introduced a Joint Resolution to provide for a constitutional amendment that reads this way: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States."

Does that amendment as written appear to you to be the type of amendment that would get results?

Mr. COOPER. Yes, sir, I believe the amendment would be designed to and would be well tailored to restore the status quo anti-*Johnson*, in other words, to essentially overrule the *Johnson* case and restore to the states and to the Congress constitutional power to enact flag desecration statutes and statutes that are limited in their purpose to protecting the flag from contemptuous conduct by itself.

Senator THURMOND. If the Congress should pass and propose this amendment to the people, and three-fourths of the States adopt it, then the Congress and the States will have power to prohibit the physical desecration of the flag of the United States, according to this amendment. And you feel that an amendment of this kind would be proper and appropriate and would ensure getting results whereas it is your opinion that the statute would be insufficient?

Mr. COOPER. Yes, sir.

Senator THURMOND. Is that correct?

Mr. COOPER. That is correct.

Senator THURMOND. Thank you very much, Mr. Cooper. We appreciate your presence here. I want to thank you for the great job you did here, you and the Justice Department. We all thank you for your service to your country.

Mr. COOPER. Thank you very much, Senator Thurmond.

The CHAIRMAN. Mr. Cooper, thank you.

The reason I did not come back is because an issue pertaining to Oliver North's pension has surfaced. The majority and minority leaders grabbed me on the floor and asked whether this committee would make a commitment to rule on whether or not the denial of the pension because of the felony conviction was appropriate or inappropriate. And I was unable to get out of the clutches of both men.

Mr. COOPER. My life then again intersects with Mr. North's once again. The last time I was in this room, it was to——

The CHAIRMAN. I recall. That is why I mentioned it.

Let me ask you to move back to the issue of whether or not the attempt——

Mr. COOPER. Excuse me, Mr. Chairman. I did not make any kind of statement earlier.

The CHAIRMAN. Oh, please do.

Mr. COOPER. Because Senator Thurmond had to rush along.

The CHAIRMAN. Please do. Go ahead.

Mr. COOPER. All right. And in fact, I will not make my prepared statement because following on the heels of Mr. Barr and Judge Bork much of it has been rendered redundant, which is to our benefit at this time of the day because——

The CHAIRMAN. But I would like, if you do not object, your entire statement to be placed in the record.

Mr. COOPER. I would appreciate that.

The CHAIRMAN. That will be done.

Mr. COOPER. But there are a few points that I would like to highlight because I think they bear reemphasis.

But before getting to that, I want to say that I am honored to testify at the invitation of the committee today on the question of the appropriate response, if any, by the Congress to the Supreme Court's decision in *Texas* v. *Johnson*. I am particularly honored to be in the presence of such widely respected scholars as you have assembled today.

Let me make one point at the outset. And that is in your colloquy with Professor Tribe, you mentioned that the purpose that animated the proposal, the legislative proposal that you have offered, is to protect the flag but not to impede speech, not to get folks who express a particular view. But the statute nonetheless does get folks who express a particular view. And obviously if it was not sufficiently broad in scope to encompass Mr. Johnson and the conduct that he had engaged in, then obviously it would, I presume, fail its principal purpose.

But in getting at Mr. Johnson, the statute also reaches a host of conduct that at least prior to *Johnson* was not swept within flag desecration statutes. And I think that is a key point. While——

The CHAIRMAN. I do not disagree with that.

Mr. COOPER. Yes, sir.

Let me emphasize that the governmental interest at stake, according to the *Johnson* decision, determines whether a restriction on expressive conduct is valid if the restriction is directed at the communicative nature of conduct, that is if the conduct is proscribed because of its expressive nature, then it must satisfy the first amendment's most exacting standards.

If, however, the restriction is unrelated to any expression connected to the conduct, if it is indifferent to the communicative nature of the conduct, then it comes within the *O'Brien* standard, which is far less muscular, far less restrictive on the Government's authorities. And it is based upon that analysis that the *O'Brien* case, *O'Brien* court upheld a statute that prohibited any destruction of draft cards regardless of the circumstances.

The statute was utterly indifferent to whether the draft card was burned or otherwise damaged or mutilated in an effort to communicate a message or whether it was done in private. Because there were very substantial Government interests that dictated the preservation of draft cards, period, interests related to the efficient function of the draft system.

Along similar reasoning, historical artifacts can be preserved by Government through a blanket prohibition on their destruction in a way that is indifferent to whether any kind of expression or communicative value is connected with conduct that would destroy them or otherwise impair that physical integrity.

The heckler in these hearings can be silenced because the Congress has an interest in, presumably, an interest in the testimony of the people who you have invited to these proceedings.

And in light of this constitutional analysis, each member of this body must ask himself or herself what interest do I intend to advance by this legislation? If it is to preserve the flag as—and like Mr. Barr, I cannot improve upon your formulation—as truly the Nation's most revered and profound symbol representing what this country stands for, then I have to confess I agree with Mr. Barr that the legislation cannot be squared with the Court's teaching in *Johnson*, at least with what I believe would be a faithful application of the Court's teaching in *Johnson*.

I should say that the Supreme Court's decisions sometimes cannot be explained in any particular area as following along syllogistically in a logical line. So I am not here to predict to you with any degree of certainty that if your statute came before the Court that Justice Blackmun would not go with the four dissenters in *Johnson* and indeed uphold it. But I do think he would have to essentially depart from the genius of the analysis of *Johnson* in order to do so.

Texas, the State of Texas, advanced the interest that you have suggested for the statute you have proposed, that is to preserve the flag as a symbol of national unity. And the Supreme Court there, as it had earlier in the *Spence* case, concluded that that interest was directed and directly related to the suppression of expression.

The CHAIRMAN. But did—if you do not mind my interrupting—did the Court not say the reason it was is because the State of Texas acknowledged that the gravamen in their case was that someone had to be offended? The State of Texas acknowledged and stipulated that absent a finding of someone being offended by the action of Johnson, they would not have brought, nor did they believe they would have been able to make a case under their statute. Is that not correct?

Mr. COOPER. It is true that the statute was not indifferent to the circumstances of the destruction of the flag. If the flag had been destroyed in a dignified, peaceful, and respectful ceremony because it was old and worn, as we have heard earlier discussion, then the Texas would not have reached it, that is true.

The CHAIRMAN. The only point I am making is I am just trying to respond to your single point. You seem to be implying that the State of Texas argued that Johnson should and could have been held liable under the statute for the mere destruction of the flag?

Mr. COOPER. No.

The CHAIRMAN. OK. We are on the same wavelength.

Mr. COOPER. They argued that the interest that supported their statute was preserving the flag of a symbol of national unity.

The CHAIRMAN. My point then is that the Court therefore never directly addressed the issue as to whether or not a, quote, "content-neutral statute," or provision that said it is just wrong to burn the flag, period, was constitutional or not?

Mr. COOPER. Well, I will concede that point, yes, sir.

The CHAIRMAN. I am not trying to be argumentative.

Mr. Cooper. No; you are right.

The Chairman. I just want to make sure I understand what the point you were attempting to make was.

Mr. Cooper. Right. But as we examine the constitutionality of proposals that are now pending as against the *Johnson* case, we have got the identify the interests that those proposals are designed to advance. And if it is designed to advance the flag's symbolic value, its ability to express what America stands for, then I believe that *Johnson* says, as did *Spence* that that interest is inextricably, inescapably related to expression.

In short, any Government interest that is related to the flag's status as a symbol will also be related to expression. For a symbol by definition has no value apart from its expressive value.

Now, in Mr. Tribe's testimony, he opened by making this point that this analysis, this constitutional analysis which we have heard from Mr. Barr was bizarre I think he called it. And I think that is a remarkable admission from Professor Tribe because the ink is not yet dry on his treatise, the second edition of his treatise wherein precisely this analysis is outlined and advanced as the correct analysis.

I am not going to go through at length the discussion from his second edition, although I will point out that I do make this point in my prepared statement, pages 9 through 11. But I think it is worth taking note that he hypothesized a statute much like the proposals that are pending, one that would have prevented all destruction of flags, including what he called closet destructions of flags, that is the burning of the flag in the privacy and solitude of one's own home in the dead of night.

And this is how he analyzed it. On its face that law differs from *O'Brien* since the only possibly legitimate interest advanced by prohibiting destruction or mutilation of any flag is an interest that arises only when such conduct is perceived by others, only when the conduct is interpreted in a certain way.

Now, Professor Tribe is frank to acknowledge that his thinking on this has changed. And I respect him for that. But in my view, his thinking on this, his earlier thinking, was sound.

Now, I have not heard anyone, supporter or opponent, of the legislative measures that are pending articulate an interest to be served by those measures that is unrelated to the flag's status as a symbol. To the contrary, it seems that that is a common ground.

But I think that fact, which will be plainly evident in the statute's legislative history should it pass, will doom the statute, at least doom it under faithful application of the analysis in *Johnson*. I believe that if such an interest could be articulated, and that is an interest apart from the symbolic value of the flag—and I have not been able to think of one—the statute that such an interest would support would have to be truly neutral. And I believe that the statute that you have advanced is indeed neutral. It would have to punish any compromise of the flag's physical integrity regardless of the circumstances or reason.

Now, earlier Assistant Attorney General Barr outlined a number of examples of conduct that he believed—and I agree with him—were in no way sinister or disrespectful of the flag and in my opinion should not in any way be swept within the reach of any prohibition on flag desecration. I will not go through those examples, but he mentioned crumbling up a cup on which a flag was represented, the making of a movie in which flags were damaged, and what have you.

Now, Professor Tribe's answer to that, Mr. Chairman, as I understand it, is that one need only declare such flags as former flags, and through some process they are no longer flags and therefore can be disposed of and presumably disposed of in any manner that the individual who is disposing of them cares to do so.

Now, I think that presents a host of problems.

At the threshold one of the problems is who decides when a flag is a former flag? I certainly think that the flag that Mr. Barr exhibited to the committee that was carried up San Juan Hill is a flag even though it is torn and it is damaged in a number of ways which would probably qualify it for respectful disposition through burning under the Congress' flag code.

So how one would define when a flag no longer was a flag and no longer was capable of expressing the symbolic value that we attach to flags, I cannot imagine. But even if one could do that, it would yield the result—which I do not think would be palatable to many—that a flag would descend to the status of say a towel and could be disposed of by individuals in any way that a towel can be disposed of, which includes contemptuous disposition.

Presumably Mr. Johnson could have under Professor Tribe's analysis of former flags simply used a former flag, an old and worn flag, for his ritual in Dallas and not have come within the statute as Professor Tribe is advancing it anyway. I do not think that solution is in keeping with what I take to be the animus for these hearings.

The constitutional premise for a statutory solution therefore is that the first amendment permits States and Congress to punish the contemptible conduct of Johnson and his comrades, but only if it also punishes, for example, a boy scout troop reverently disposing of an old and worn flag in a dignified, respectable way.

Now, I think this notion falls uneasily on the ears of most Americans. Because I do not believe, certainly I am submitting to you as a citizen, that it is an odd constitutional doctrine that would require us to be blind to the distinction between those two scenes.

Which brings me to my next point, and I will accelerate it. And that point deals with the parade of horribles that will follow behind passage of any constitutional amendment. We have heard a number of those this afternoon and generally in the debate, the very important debate, on this issue.

Opponents of a constitutional amendment have suggested that the States empowered through the constitutional amendment with this new constitutional authority to prohibit flag desecration would essentially go over the edge and would enact statutes that do a lot of things that strike us as we discuss it quite silly. Indeed, I think one of the witnesses on the House side suggested the States might enact capital punishment for flag desecration. We have also heard that there will be a cascade of legal issues and litigation to resolve those legal issues should an amendment be enacted.

And finally, we have heard that the sacred values reflected in the first amendment itself would be forever compromised should an amendment be passed. I would like to try to put these matters back in perspective.

Prior to *Johnson*, 48 States and the Congress believed that legislation prohibiting the conduct engaged by Mr. Johnson was entirely consistent with the first amendment. Now, that widespread constitutional judgment was not of recent origin. It stretched back 100 years in many cases, and with respect to many State laws.

Regarding consequences and including unintended consequences that would follow along passage of an amendment, I simply rely on the fact that for the 100 years that preceded *Johnson*, none of these horribles came to pass. And yet the constitutional train that the amendment seeks to create was the train that the States and the Congress believe was in place prior to *Johnson*. And beyond that, the calm that I think preceded *Johnson* would not have been interrupted if one vote had been changed in the *Johnson* case.

If you, Senator Biden, had been on the Court at the time in the place of one of the majority, I know from your earlier testimony that that case would have come out differently. I do not believe that the parade of horribles that we have heard would likely have followed in train had one vote been changed in that case and the flag desecration statutes in all of the States had been affirmed in terms of their constitutionality.

In sum, let me close with the point that the Supreme Court is not the final word on matters related to our Constitution. The American people are. The Founders wisely took care not to enslave the American people to the constitutional interpretations of the Supreme Court. Rather, the Founders crafted carefully article V of the Constitution. They made the process for amending that document arduous and difficult. And I think they well should have.

Earlier in a conversation with Senator Thurmond, we recognized the difficulty of that process. And only 26 times had it been successfully employed by the American people. But nonetheless the authority resides wisely in their hands.

When the Supreme Court errs in its constitutional judgments in a matter of surpassing importance to the American people, it is entirely appropriate for them to correct that error. Indeed I believe it is their responsibility to do so.

Again, I appreciate very much the opportunity to share my thoughts with this committee.

[The prepared statement of Mr. Cooper follows:]

TESTIMONY OF CHARLES J. COOPER BEFORE THE SENATE JUDICIARY COMMITTEE
AUGUST 1, 1989

Thank you Mr. Chairman.

I am grateful for this opportunity to testify before this distinguished Committee on the appropriate congressional response to the Supreme Court's decision in Texas v. Johnson, 57 U.S.L.W. 4770 (June 21, 1989).

Mr. Chairman, in Dallas in 1984, some of our countrymen watched in anguish and in anger as a group of protesters chanted "America, the red, white, and blue, we spit on you," while one Gregory Lee Johnson set fire to a kerosene-soaked American flag. One patriotic onlooker gathered the portion of the flag that the flames had not consumed and buried it in his back yard.

The anguish and anger felt by the few witnesses to that despicable scene spread throughout the land a month ago, when the Supreme Court ruled that the First Amendment shielded Mr. Johnson from conviction under a Texas statute prohibiting the burning of an American flag in a way that he knew would "seriously offend" the onlookers. In so ruling, the Court in effect overturned the flag desecration statutes of forty-eight states, as well as the Federal Flag Desecration Statute, which prohibits knowingly and publicly "cast[ing] contempt upon any flag of the United States" by burning or otherwise physically mistreating it. 18 U.S.C. 700.

The reaction of the American people to the Johnson decision was swift, loud, and overwhelming negative. President Bush and several Members of Congress have called for a constitutional amendment to reverse the decision, while other Members of Congress have introduced or supported legislation designed both to protect the dignity of the American flag and to harmonize federal law with the Court's decision in Johnson. The primary statutory proposal under consideration -- S. 1338 -- has been introduced by Senator Biden and is premised upon a constitutional analysis supported by Professor Laurence Tribe and, as I understand it, several other prominent constitutional scholars. While I applaud Senator Biden and Professor Tribe and other supporters of S. 1338 for the patriotic sentiments that it reflects, I am nonetheless persuaded that the measure cannot be squared with the Court's teaching in Johnson and that, even if it could, it is not a fitting and suitable solution to the problem presented by the Johnson case. Rather, I believe that the problem created by the Johnson case can be adequately remedied only through a constitutional amendment.

S. 1338 would amend the Federal Flag Desecration Statute by deleting the existing requirements that the prohibited act be performed "publicly" and in a manner that "casts contempt" upon the flag. As amended, the statute would read:

> Whoever knowingly mutilates, defaces, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

Stressing that the Johnson Court struck down the Texas flag desecration statute because it was "aimed at protecting [the flag] against only those acts of physical destruction that 'would cause serious offense to others'" and thus "'depended on the communicative impact' of the conduct," Senator Biden has explained in congressional testimony that S. 1338 would "ban destruction of the flag in all circumstances, regardless of the point of view being expressed . . . ." Testimony of Senator Joseph R. Biden, Jr., before the Subcommittee on Civil and Constitutional Rights, July 13, 1989, at 4 ("Biden Testimony"). Thus, S. 1338 seeks to establish a "neutral" flag desecration statute -- one that punishes any violation of the physical integrity of the flag, whether performed in public or in private and regardless of the intent of the conduct. As Professor Tribe has stated in support of S. 1338, "all we want to do is protect all American flags from deliberate destruction or substantial mutilation, regardless of any message that might be intended or conveyed by the act of destruction." Testimony of Laurence H. Tribe before the Subcommittee on Civil and Constitutional Rights, July 18, 1989, at 14 ("Tribe Testimony").

The stated purpose of S. 1338 raises a threshold question that must be considered before the matter of its constitutionality is addressed. Namely, does anyone really want a "neutral" flag desecration statute. Is it true that "all we want to do" is to protect the physical integrity of all American flags, regardless of the circumstances surrounding the prohibited conduct?

The act of burning an American flag is not inherently evil. Indeed, the Boy Scouts of America have long held that an American flag, "when worn beyond repair" should be destroyed "in a dignified way by burning." Boy Scout Handbook at 422 (9th ed.) (Similarly, Congress has prescribed that "[t]he flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning." 36 U.S.C. 176(k).) Nor is the respectful disposition of an old or worn flag the only occasion on which burning a flag might be entirely proper. The old soldier whose last wish is to be cremated with a prized American flag fast against his breast would be deserving of respect and admiration, rather than condemnation.

In contrast, Gregory Lee Johnson's conduct was offensive -- indeed, reprehensible -- not simply because he burned an American flag, but because of the manner in which he burned it. Yet, S. 1338 would require us to be blind to the distinction between the conduct of Gregory Lee Johnson and his anti-American comrades in Dallas and the conduct of a Boy Scout troop reverently burning an old and worn American flag. It would also reach other forms of conduct that honor, rather than desecrate, the flag. If, rather than burning an American flag, Gregory Lee Johnson and his colleagues had heaped dirt upon it in some sort of anti-American burial ritual, their conduct would undoubtedly have violated the Texas Flag Desecration Statute and would also have violated the "neutral" prohibition of S. 1338 against "defiling" a flag. It follows, however, that this "neutral" proposal would also reach and punish the conduct of the nameless man in Dallas who gathered up Johnson's charred flag and buried it in his back yard.

Moreover, not only would S. 1338 prohibit conduct that should be praised rather than punished, it would fail to prohibit an infinite variety of public conduct that casts contempt upon the flag. The bill would prohibit only conduct that compromises the physical integrity of the flag. Conduct that is not physically destructive of the flag, no matter how openly offensive and disrespectful it may be, is not reached. Thus, displaying the flag in a patently offensive and contemptuous manner -- for example, flying it upside-down beneath a Nazi swastika -- would be protected. Similarly, affixing an American flag to the seat of one's pants or simulating vulgar acts with a flag would not come within the prohibition of S. 1338.

Thus, a "neutral" flag desecration statute is at once too broad, since it would prohibit conduct that no one wants to prohibit, and too narrow, since it would permit conduct that few if anyone wants to permit. The proposal therefore simply does not mesh with the public sentiment that animated the passage of the Federal Flag Desecration Statute and similar measures by forty-eight states, that led to the prosecution of Gregory Lee Johnson under the Texas Flag Desecration Statute, that provoked the extraordinary public outcry that greeted the Supreme Court's reversal of Johnson's conviction, and that plainly inspired these hearings. I submit that that public sentiment is not "neutral"; it is not indifferent to the circumstances surrounding conduct relating to the flag. If such conduct is dignified and respectful, I daresay that the American people do not want to prohibit it, if such conduct is disrespectful and contemptuous of the flag, I believe that they do. In light of the Court's decision in the Johnson case, however, it is clear that the federal and state governments can enact legislation that does no more than to prohibit public conduct that casts contempt upon the American flag only by first reversing Johnson through a constitutional amendment.

Quite apart from my view that no one really wants a "neutral" flag desecration statute, I regret to say that S. 1338 does not, in my view, fulfill its other stated purpose: that is, to harmonize the Federal Flag Desecration Statute with the Johnson decision. To the contrary, I am persuaded that S. 1338 cannot be squared with the majority opinion in Johnson.

The primary analytical basis for the Biden bill is the Supreme Court's 1968 decision in United States v. O'Brien, 391

U.S. 367 (1968). In that case Mr. O'Brien challenged the constitutionality of his conviction under a federal statute criminalizing the knowing destruction or mutilation of a draft card. He argued that his act of burning his draft card was "symbolic speech" protected by the First Amendment. The Court rejected O'Brien's constitutional claim, noting that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." Id. at 376. The Court stressed that the asserted governmental interest must be "unrelated to the suppression of free expression." Id. at 377. Noting that the challenged statute prohibited private as well as public destruction of a draft card, the Court determined that draft cards serve a number of important governmental purposes, such as providing proof of registration and facilitating communication between the draft board and the registrant, all of which would be defeated by the cards' destruction. Because the asserted governmental interest and the challenged statute were limited to preventing harm to the efficient functioning of the draft, and because O'Brien was convicted solely for the noncommunicative impact of his conduct, the Court upheld O'Brien's conviction. Id. at 382.

In O'Brien, it was clear that the government's important interest in preventing the destruction of draft cards -- to facilitate the smooth and efficient operation of the draft system -- was wholly indifferent to whether draft cards were destroyed publicly or privately and whether their destruction carried a particular political message. The government's interest would be frustrated by any destruction of a draft card, regardless of the circumstances. Because the challenged statute was thus unrelated to the suppression of free expression, it could be justified under the less stringent First Amendment standard established by the Court for regulations of noncommunicative conduct.

In the Johnson case, the Court rejected, correctly in my view, the State's argument that its flag desecration statute should be upheld under the rationale of O'Brien. The State of Texas offered two interests to justify the prohibitions contained in its flag desecration statute: preventing breaches of the peace, and preserving the flag as a symbol of nationhood and national unity. The first interest -- preventing breaches of peace -- would not appear to be relevant to S. 1338, since that interest would not be furthered by a prohibition against private destruction of a flag. Nor do supporters of S. 1338 assert an interest in preventing breaches of the peace to justify the measure. Rather, the proposed measure is designed solely to preserve the flag's unique status as, to use Senator Biden's words, "truly the Nation's most revered and profound symbol, representing what this country stands for." Biden Testimony at 1.

In Johnson, the Court concluded that the State's interest in preserving the flag's unique symbolic value is implicated "only when a person's treatment of the flag communicates some message" and is thus related to the suppression of expression. 57 U.S.L.W. at 4773. The Court thus applied "the most exacting scrutiny" reserved for governmental suppression of speech and, accordingly, invalidated the Texas flag desecration law.

The Johnson Court was plainly correct in determining that the governmental interest in preserving the flag's unique status as a national symbol cannot be divorced from expression, for only messages concerning the flag can either advance or retard its symbolic value. As the Johnson majority observed: "The very purpose of a national flag is to serve as a symbol of our country." 57 U.S.L.W. at 4772. It is frankly difficult to conceive of a purpose for the flag that is independent of its status as our most precious national symbol.

Indeed, in an earlier writing Professor Tribe expressed similar views. In his much-cited treatise on constitutional law, Professor Tribe analyzed a hypothetical statute prohibiting the destruction or permanent mutilation of "any object bearing a pattern of the U.S. flag on its surface." Noting that the hypothetical law, on its face, "seems to ban conduct regardless of whatever message the conduct conveys," Professor Tribe asked: "[W]hat is the government's interest in preventing such acts?" Suggesting the governmental interest "in preserving the flag as a national symbol capable of mirroring the sentiments of all who view it," Professor Tribe asked a second question: "[H]ow is the flag's role as such a universal symbol threatened by someone's act in destroying a particular flag?" To test this question, Professor Tribe considered

> whether the national symbol, which the government seeks to preserve unsullied, would be corrupted or interfered with in any way by "closet" flag burnings -- people drawing their own flags on flammable fabric and igniting them in the dead of night in the privacy of their homes. The answer is quite clearly no; the symbol is degraded, if at all, only to the degree that people learn of the act.

Tribe, American Constitutional Law at 801-802 (2d ed. 1988). Professor Tribe thus rejected the O'Brien case as a useful analogy, since the legitimate governmental interests in preventing the destruction of a draft card were wholly unrelated to any message associated with such destruction. As Tribe put it: "On its face, the [hypothetical law] differs from O'Brien, since the only possibly legitimate interest advanced by prohibiting destruction or mutilation of any flag is an interest that arises only when such conduct is perceived by others, and only when the conduct is interpreted in a certain way. Thus the hypothesized law should be scrutinized by reference to the [First Amendment's most demanding standards]." Id. at 802.

I think that Professor Tribe's earlier thinking on this subject was sound.

Some have suggested, including Professor Tribe, that S. 1338 can be justified on the same basis as statutes protecting the physical integrity of historical artifacts and places. To be sure, the preservation of historical artifacts is supported by government interests that, like preserving draft cards, are wholly unrelated to any message that might be conveyed in connection with their destruction. And those interests would undoubtedly attach to any flag that had some special historical significance. Plainly, these interests would justify a governmental prohibition on the destruction, for whatever reason and regardless of the circumstances, of the flag that Francis Scott Key observed over Fort McHenry while composing the "Star Spangled Banner." See, Tribe, American Constitutional Law at 799. It is ludicrous to maintain, however, that a statute prohibiting the destruction or despoiling of any and all American flags would be justified as furthering this interest or any similar interest.

Finally, I would like to address the suggestion made by Professor Tribe that S. 1338 would not necessarily extend to the "routine and respectful disposition" of old and worn flags when they are no longer usable. Tribe Testimony at 10. Professor Tribe refrains from expressing a view, however, on whether a specific exception for "routine and respectful disposition" of such flags should be added to S. 1338 or whether the legislative history of the statute should be developed to support such an exception. Establishing such an exception through either method, I submit, would make clear that the statute's "neutrality" is a transparent pretext and would bring it squarely into conflict with Johnson. Indeed, the majority in Johnson says as much:

> If we were to hold that a State may forbid flag-burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role -- as where, for example, a person ceremoniously burns a dirty flag -- we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol . . . only in one direction. We would be permitting a State to "prescribe what shall be orthodox" by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.

57 U.S.L.W. 4775. It is, therefore, clear from the language and reasoning of the majority opinion in Johnson that government cannot condition the disposition of old or worn flags on the requirement that the disposition be performed in a "respectful" manner. Any such requirement would obviously be related directly

and exclusively to the content of any message that might be associated with the flag's disposition.

Alternatively, a genuinely "neutral" exception for old or worn flags -- that is, an exception that extends to contemptuous as well as respectful disposition of such flags -- would permit Gregory Lee Johnson to replicate his 1984 performance so long as he selected for his ritual an old or worn flag. Putting aside the question of how a governmental interest in preserving the physical integrity of all flags can accommodate an exception permitting the destruction of some flags, any such "neutral" exception would presumably defeat the very purpose of the statute.

In sum, while I believe that the search for a suitable statute should prove unavailing before a constitutional amendment is considered, I am constrained to the view that the status quo ante Johnson cannot be restored by statute. Rather, authority to prohibit public desecration of the American flag -- an authority exercised by States for over 100 years and lost in the Supreme Court by a margin of one vote -- can be restored to the American people only through an amendment to the Constitution. I believe the American people should have that authority, and therefore urge your favorable consideration of an appropriate constitutional amendment to reverse the Johnson case.

The CHAIRMAN. I am the one who appreciates the fact that you were willing to share your thoughts.

In the interest of your time and Solicitor General Griswold's time, I would like to ask, because you have already answered the one, most important question I wanted to pursue and that was the inherent nature of, by attempting to protect the symbol, your argument, which you have articulated well, that that inherently goes to speech; and I have——

Mr. COOPER. Senator, not really speech. I think——

The CHAIRMAN. It goes to——

Mr. COOPER. It goes to expression.

The CHAIRMAN. It goes to expression. I should be more precise.

Mr. COOPER. Mr. Johnson could not——

The CHAIRMAN. Yes.

Mr. COOPER [continuing]. Be convicted for saying "America the Red, White, and Blue, we spit on you." He could not before *Johnson*——

The CHAIRMAN. Yes, he cannot.

Mr. COOPER [continuing]. And I am supporting no amendment that would——

The CHAIRMAN. Allow——

Mr. COOPER [continuing]. Empower the States to punish him for that.

The CHAIRMAN. I misspoke. I believe I understood what you meant.

I may or may not have some questions here, and I would like to ask whether you would be willing to respond to them in writing.

Mr. COOPER. I would be happy to.

The CHAIRMAN. There is plenty of time. When I say, respond in writing, by the end of September, so I am not trying to push on this. I know you have other responsibilities.

Mr. COOPER. I would be happy to, Mr. Chairman, of course.

The CHAIRMAN. And, again, I thank you for your—you have acted as you did when you were Assistant Attorney General, and that is, you were generous and you are gracious, and I appreciate your allowing the other witnesses to accommodate their schedules, at your expense.

Mr. COOPER. I am sure they would do me the same kindness.

The CHAIRMAN. Well, I hope so. I hope none of you have to worry about that in the future before this Committee.

Thank you.

Mr. COOPER. Yes, sir.

The CHAIRMAN. Dean Griswold, there is another vote on. I am going to go and vote, and I am going to ask you then, if you are willing, to give me your testimony, and I should note before I run over and vote that I am told, which I think is absolutely astounding, that it was 54 years ago that you testified in this very room against the plan of President Franklin Delano Roosevelt to pack the Supreme Court.

Is that true?

Mr. GRISWOLD. Yes.

That not only is it true, but I think I was sitting just about exactly in this particular bit of space. [Laughter.]

The **CHAIRMAN**. Well, I think that is absolutely incredible. I am so embarrassed. You have no idea the respect and regard that I have for you, and here I have you as the last witness. And you have waited so long.

But, with your permission, I am going to run and vote. I will not allow the majority leader, or minority leader, to waylay me at all. I will come straight back and then you and I can close this hearing, if you are willing.

OK?

Mr. **GRISWOLD**. Well, it has been a long day, and I will simply summarize my views.

The **CHAIRMAN**. Well, Dean, I really have to go and vote now. I will come right back. I have to vote. There are 4 minutes left for me to vote.

Mr. **GRISWOLD**. OK.

The **CHAIRMAN**. And then we can summarize.

Mr. **GRISWOLD**. I hope you vote the right way.

The **CHAIRMAN**. I am not even sure how I am voting.

[Short recess.]

The **CHAIRMAN**. Again, Dean, thank you for your indulgence.

Please proceed. The floor, the room, the house is yours.

STATEMENT OF HON. ERWIN N. GRISWOLD, JONES, DAY, REAVIS & POGUE, WASHINGTON, DC

Mr. **GRISWOLD**. As I was saying, it has been a long day, and I will simply summarize my remarks.

Like all of us, I revere the flag. I think it is beautiful, both in design and color and for what it stands.

The United States of America is the only country in the world that is so successful, as successful as it is in operating a free and decent country of 250 million people. That is an enormous task at which we falter here and there, but on which, on the whole, it seems to me, we do the job which makes me proud to be an American.

In summary, my views are that there should not be a constitutional amendment, and I am equally opposed to the adoption of a statute.

This seems to me to be a situation which calls not so much for the application of the decisions and strict construction and talk that some of the other witnesses have given, which I think is entirely relevant and helpful; but it seems to me this is a case for the application of broad, general judgment, wisdom, and, yes, statesmanship.

It is appealing to wrap ourselves in the flag, and indeed it may be popular at the moment. But I do not believe it is truly statesmanlike.

This is a case, I think, where we should make full use of what Justice Stone referred to, and that is the "sober, second thought of the American people."

And then I think back to the words of John Marshall in *Marbury* v. *Madison*: "It's the Constitution that we are considering." And we should not let it get mixed up with detailed provisions about some specific matter that has happened to give us concern.

I think of a speech I made in England a number of years ago, where I referred to the majestic language of the Bill of Rights: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press."

And I compared that with the constitutional provisions that our British friends had made for some of their emerging nations like Nigeria, where they put in some language like that.

But then they added on, after it: "But nothing in this provision shall prohibit the enactment of a law which is consistent with appropriate standards in a free and democratic community," thereby making it more or less meaningless.

I argued the *O'Brien* case before the Supreme Court on behalf of the United States. That is the case involving the burning of a draft card. I rather thought that one was going to control the *Johnson* case from Texas.

The trouble with the *Johnson* case was that language in the Texas statute which made it a crime to desecrate the flag in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

That immediately threw it into the speech area rather than the action area. I am troubled by the proposed constitutional amendment. It turns heavily on the word desecrate, which is not a word of everyday speech, not wholly clear in its meanings.

I think of one thing I am surprised somebody has not mentioned before, but millions and millions of times a day a government agency, the U.S. Post Office, defaces the American flag. The American flag is on a number of our stamps, and it is smeared with ink, which I would think is a kind of desecration.

Similarly, I am troubled by such things as this: I see a man who has been badly hurt in an automobile accident. The only thing I can find is a flag, and I use it to wrap around his arm as a tourniquet, and I save his life. The flag gets smeared with blood. Is the flag desecrated?

We have all kinds of problems which arise in that area. And for similar reasons I am opposed to the adoption of a statute to try to—I hate to say "get around"—to try to deal with the problem presented by the *Johnson* case.

In the first place, any statute that can be drafted will be subject to endless litigation.

At the request of one of your staff members, Senator Biden, I tried to draft a statutory provision. I started out with the thought that it would not be all that hard; and I focused heavily on the action, making it plain that no speech or anything else had anything to do with it. It was simply the action.

But then, I ran into a number of things where it is appropriate to destroy a flag, and I tried to put those into it, and it ends up with a situation where, if there is any sort of political context and the person doing it is doing it for the purpose of expressing an opposition to some governmental action, that I find it extremely difficult to think that this Supreme Court or I would almost say any Supreme Court would hold it to be constitutional.

I am particularly concerned about one of the provisions in the bill which I understand is under consideration by the House committee calling for immediate review by the Supreme Court. I have a copy of the House bill, and it says:

> If the question of the constitutionality of this section, under the first Article of Amendment to the Constitution of the United States, is properly presented in any case before a United States District Court, that court shall immediately certify that question to the Supreme Court.

Now, that seems to me to be an extremely unwise thing to do. That calls for certification before there has been any evidence, before there has been any finding of fact, before there has been a jury verdict. I feel sure that the Supreme Court will say, "Well, this just calls for an advisory opinion, and we have long since been established that we have no power to give advisory opinions, and that indeed this provision as it now stands would be unconstitutional."

But, even if that were revised and, to provide that after a final judgment in a district court in such cases, a direct appeal may be taken to the U.S. Supreme Court, I would be very much concerned.

I represented the United States in the courts, first, as a junior, and later as the Solicitor General, for a total of 11 years; and one of the principles of the Solicitor General's office is: "Don't ever risk an important question on a poor case."

Now, that is exactly what happened in the *Johnson* case. It is that Texas statute which requires proof that it caused offense to some person at the time.

I like to think that if that case had been a U.S. Government case and had come through the Solicitor General's office, he would have said, "Well, no, no, we are not going to take this case. This is too dangerous."

And I have a little feeling that if a statute is now enacted to try to deal with this problem, that it will simply end up with another precedent in this area.

On the whole, I do not worry too much about that. I do not think that the Republic is shaken by the Supreme Court's decision in the *Johnson* case.

A good many words were expressed, perhaps, with a view to being quoted in the local newspapers during the first couple of weeks after it. But, as I go about and talk with people, I get pretty much a shrug of the shoulders about it.

The Republic still stands. It is going to stand. This is not going to happen very often. When it does happen, it will tend to be either screwballs or somebody with a legitimate complaint who thinks he cannot get attention in some other way, and that, it seems to me, is really the essence of the first amendment.

And I think that anything that is done which will impair the crystal clarity of the first amendment, which will open the door to other kinds of amendments, qualifying the first amendment is far more dangerous to the Republic for which the flag stands than any occasional abuse of action with respect to the flag which will result.

We have gone for 200 years with virtually no prosecutions about desecrating the flag. We teach high standards about the flag. Most Americans are extremely patriotic, and I would put my faith in the Constitution as it stands, hope that there will not be an amendment.

I recognize the fact that the proposal for a statute is, in a sense, intended to protect the integrity of the Constitution. If I saw a clearer way to produce a statute which would really do it, I would certainly give it very careful consideration, but I do not think there is such a way, and therefore I have finally come to the conclusion that I am in opposition to a statute.

I may say that I am a member of a task force appointed by the president of the American Bar Association to propose resolutions to the house of delegates of the association meeting in Honolulu next week. I am not in a position to give the text of the report of the task force, but I can say that the task force, which has some very distinguished members, is unanimously in favor of the proposal that the bar association adopt a resolution against a constitutional amendment and against any statutory position.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Dean.

If you are willing, I have a few questions——

Mr. GRISWOLD. Yes, indeed.

The CHAIRMAN [continuing]. If you are willing to stay a little longer.

Mr. GRISWOLD. While you were gone, I had a chance to tell my wife that I was waylaid and——

The CHAIRMAN. We can vouch for your presence. I will be happy to write a note.

Little did I ever think the day would come that I would be in the position to maybe be of mild assistance to one of the most distinguished legal minds in American history, by vouching for his presence before a committee to his wife. If you need me to do that, I would be happy to.

Dean, you have made your position very clear. I would like to ask you, though, notwithstanding your opposition to both proposals, to deal with a few assertions that have been made by both those who support the amendment, as well as those who support legislation.

It has been said here several times today that a constitutional amendment, specifically the President's constitutional amendment that empowers the States to write laws relative to preventing "the desecration of the flag," that if such an amendment were enacted and the States chose to take advantage of the amendment, that all that would happen is that we would merely return the law to where it stood prior to June 20 of this year, the day before the Supreme Court decided *Texas* v. *Johnson*.

And my question is this: Is that correct? Or do you think a constitutional amendment would give the states a great deal more leeway than they had prior to *Texas* v. *Johnson*.

I am not sure I articulated that clearly enough. But you understand what I am asking?

Mr. GRISWOLD. Yes, Senator.

I think that it would make a difference, not enough difference to warrant an amendment to the Constitution. I think it would make a difference. Specifically, it would enable Texas and New Jersey and Pennsylvania and California to enact a statute like the Texas statute that was involved in *Texas* v. *Johnson*.

And that statute is—you know, it is terribly unfortunate that this question came up with that statute, but that statute is, on its face, an interference with freedom of speech.

The **Chairman**. Yes.

Mr. **Griswold**. And I hate to see something put into the Constitution which authorizes an impairment of freedom of speech.

Now, I say that as one argued in the *Pentagon Papers* case against freedom of the press, because I do not think that "no law" in the first amendment really means "no law." I think it means "almost no law," but I think there is a leeway, as Chief Justice Hughes said, to use what is now an out-of-date analogy, but to prohibit the papers from printing the sailing dates of troop ships, I think, would have been constitutional and is today constitutional, even though it was a law enacted by the Congress, and the first amendment says "Congress shall make no law."

This is where Marshall's phrase of "It's the Constitution we are interpreting" comes into operation. And, so, I think that the adoption of the President's amendment would slightly impair the freedom of speech given by the first amendment in a situation where I don't think it is really worth making that impairment even though it is not a very big one.

The **Chairman**. My concern, and I would like you to comment on that, is that a number of States out of the 48 that have statutes making it illegal to burn or otherwise do things to the flag that the vast majority of Americans apparently do not want done.

My concern is that when those statutes were drafted, in the 48 States, there was assumed to be by the drafters a limit beyond which they could not go. I believe the legislative bodies wrestled with the concern as to whether or not, if they went too far, their actions would be declared unconstitutional because they would be on a collision course with the first amendment.

My worry is with an amendment of the nature of the President's amendment, that those brakes, that instinct not to push too far, are taken off, because I see no brake, if you will, placed upon a legislative body as it relates to impinging upon freedom of speech.

A legislative body could be very explicit under the President's amendment, a State legislative body, in making a distinction between and among certain types of speech that were considered to be offensive as it related to the destruction of the flag.

In other words, they could pick and choose in ways that I do not believe that any legislative body thought they could prior to a constitutional amendment.

I am not sure I am again making my point clear, but I am worried that this will be a signal to the states to go beyond even what the authors of the amendment intend, which is merely to put the situation back to where it was pre-*Texas* v. *Johnson*.

Mr. **Griswold**. Well, it seems clear to me that it certainly does authorize the States to go beyond what most people contemplated or understood was the limit on their power in this area without a new amendment.

The **Chairman**. Yes; my——

Mr. **Griswold**. It seems to me we have really a wonderful opportunity to follow Justice Brandeis's reference to the "laboratory of the States," and now we have the first amendment, and we have the *Texas* v. *Johnson*. If there is any room for a statute within that, some of the States might enact statutes which would come before the Court, and if they were upheld, then we would have a clarification.

The **Chairman**. I agree with you. It is the point I was going to make.

I have recommended publicly and to the Governors that I thought that they, the States, should, to use the phrase that you have used, become the laboratory.

Mr. **Griswold**. Yes.

The **Chairman**. And to that end, if I am not mistaken, the State of New York has either already concluded that it would be the laboratory. I received a call from—correct me, if I am wrong here—I received a call from Governor Cuomo of New York telling me that he is taking my statute, or the statute which I drafted, or at least something very close to that, and moving it through the New York State Legislature.

So, we may very well, by the time this whole thing is concluded here, find ourselves in a situation where the Court has further clarified the limits, the constitutional limits of efforts to "protect" the flag.

Mr. **Griswold**. That seems to me to be a very good route to follow.

The **Chairman**. I do not disagree with that.

I said that was my last question. With your permission, I have one more. I know I am keeping you awfully late.

The argument is made that if the President's version of the constitutional amendment, his amendment, were to be adopted by the various States, that it would set a tone of certainty and eliminate litigation.

Mr. **Griswold**. Well——

The **Chairman**. And my concern is the exact opposite. It seems to me it will encourage litigation.

Mr. **Griswold**. I think it will not only encourage, it will stimulate litigation.

The **Chairman**. That is what I think, too.

So, therefore, that is one of the major arguments used.

Mr. **Griswold**. To me, this is one of those clear situations where you take what it is and you conclude it is not really all that important, and you sit back and before you know it, it has disappeared.

The **Chairman**. Yes.

I think it is interesting, quite frankly, that if you look at the public opinion polling data that has recently come out, that the more people reflect on this, the less enthusiasm there is for amending the Constitution.

Mr. **Griswold**. I hope that is the case, but I think this is a situation where the representatives of the people in the Congress of the United States should be ahead of the people, should be statesmen, and we should not trivialize the Constitution by putting in an amendment upon a relatively unimportant problem, on an issue as to which 99.9 percent of the people in the country are agreed.

The **Chairman**. Your use of the phrase "trivializing the Constitution" is exactly the comment that I made on the day that I introduced the bill.

Whether or not a constitutional amendment could be drafted that would have extremely limited, if not no impact, on the first amendment, I still am concerned because of a notion that it would trivialize the Constitution.

But I think that this hearing and others that will follow may be another kind of laboratory, hopefully. Not always do we shed light on problems in this body, as you well know from your experience, but occasionally we do, and occasionally we learn.

I have learned a number of things today, notwithstanding how disjointed this process was, and I believe my colleagues will also, and I hope that the President, although he is not listening, I am sure—I hope that his advisers will advise him on some of the things that have been put forward here today and in the next three hearings that we have.

Mr. GRISWOLD. He came out with an excellent statement 2 or 3 days after the case was decided. He said that he did not agree with it but that it was his duty to comply with the decisions of the Supreme Court.

I have referred to "a sober, second thought," and in this case I hope he will have the "sober, third thought," and——

The CHAIRMAN. Someone suggested the second thought was not sober; it was inebriated. I do not mean the President, I mean—what's the—I do not want to use the word inebriated there.

Well, I should not even fool with that. I should leave that alone.

Mr. GRISWOLD. This is a different meaning——

The CHAIRMAN. But the second thought was not——

Mr. GRISWOLD. This is a different meaning of the word "sober."

The CHAIRMAN. "Sober" means "reflective" in this case.

Mr. GRISWOLD. That is right.

The CHAIRMAN. And I am trying to think of an appropriate—anyway, I should drop that whole subject.

I have learned another thing today. I have learned that there are people who do fit the expression—who do warrant the comment that has been used in context in the circumstances where it has, in fact, trivialized the phrase.

But the phrase I am about to use is, I think, completely appropriate as applied to you. You are a scholar and a gentleman, and that cannot be said of many of us; and I really am honored that you would be here and I respect your point of view and find much of what you say compelling.

Again, Dean, thank you very, very much for your time and your effort.

Thank you, and thank your wife for me.

Mr. GRISWOLD. Thank you, Senator.

The CHAIRMAN. Thank you very much.

The hearing is adjourned.

[Whereupon, at 7:23 p.m., the committee adjourned, subject to the call of the Chair.]

MEASURES TO PROTECT THE PHYSICAL INTEGRITY OF THE AMERICAN FLAG

MONDAY, AUGUST 14, 1989

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Philadephia, PA.

The committee met, pursuant to notice, at 9:17 a.m., in Old City Hall, Philadelphia, PA, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senator Specter.

The CHAIRMAN. The hearing will come to order.

I'd like to make it clear at the outset that the difficulty with the sound system has nothing to do with the age of the building, it has nothing to do with the electronic equipment that is in this building. And so, although this magnificent courthouse was built a couple of hundred years ago, it is not the reason for the inability of the electronic media to be able to cover this hearing. Let's just let it ride out a minute, and see if they can get the system to work.

Judge, it never happens like this in your courtroom, does it?

Judge POLLAK. No, Senator.

The CHAIRMAN. I didn't think so. That must mean we are appropriating too much money for you if it never happens. [Laughter.]

May I ask the fellow in the corner is it all right for us to begin, or will there be another sonic boom? At any rate, we are going to give it a shot and start the hearing.

OPENING STATEMENT OF SENATOR BIDEN

The CHAIRMAN. Let me say at the outset that the Judiciary Committee convenes this morning in the second of a series of hearings that we are holding on the issue of what, if anything, to do about making the burning or desecration or any other phrase that is often used in the statutes and constitutional amendments that have been offered of the flag illegal in light of *Texas* v. *Johnson.*

We decided to hold the hearing here at the request of the leadership of the U.S. Senate because they felt that it would be particularly appropriate to come to Philadelphia as we looked at, studied and heard testimony about the very, very serious and solemn undertaking of amending the Constitution.

We happen to be sitting one floor above where the first Supreme Court decision ever rendered by the United States Supreme Court was rendered, and we are less than half a block away from where the flag was adopted as our national symbol.

We have also decided that, unlike our usual practice, we are holding this hearing during the time the Congress is in recess, a time when we are usually back with our constituencies, meeting them and holding town meetings and taking the time to meet face-to-face with them, which we are unable to do during the regular legislative calendar.

But this hearing, as I said, is felt to be a very important hearing, and we have a set of very distinguished witnesses who will be testifying here this morning on the issue of whether or not to amend the Constitution. And I hope we will have testimony on the issue of whether or not we are capable of passing a statute which would be constitutional, a statute which would make the burning of the flag illegal.

I am the author of that particular statute, cosponsored by a number of my colleagues, particularly my senior colleague from Delaware, Senator Roth, and I as well as the cosponsors believe that if it is possible to merely pass a piece of legislation that would meet constitutional muster, then that is what we should do because it is serious business amending the Constitution of the United States. And I might add that if we can do it by statute, we will be able to do it much more quickly, much more rapidly, and I believe equally as effectively.

I will now yield to my colleague from Pennsylvania, Senator Specter, for any opening statement he may have.

OPENING STATEMENT OF SENATOR SPECTER

Senator Specter. Thank you very much, Mr. Chairman.

I am delighted to join you today. I commend you for bringing this important hearing to the people, to hold it in this historic setting, one floor above the Supreme Court chamber from 1791.

This is an important subject. When the Supreme Court of the United States handed down its decision striking down the Texas statute and in effect upholding the flag burning, there was a wave of indignation across the United States, and I will confess to being one of those who was indignant. It seemed to me at that time that there was ample precedent for upholding the Texas statute within a variety of contexts, the clear and present danger or the parameters of obscenity, or the parameters of fighting words.

Immediately after the decision, we had a recess, and I was at a Veterans of Foreign Wars meeting in Valley Forge, PA, the suburbs of Philadelphia, and the feeling was very, very high.

I believe that that ardor, candidly, has cooled somewhat. I was in Pottsville last Tuesday, and there was a group from the Veterans of Foreign Wars immediately adjacent to a young man who rose and read a long statement opposing the constitutional amendment, and there was peace and tranquility. I think had the statement been read in opposition to a constitutional amendment 2 months earlier that there would have been bedlam if not mayhem in that particular setting.

So that as we approach this issue today, we do so in a more detached setting as to what response there ought to be, if any.

I have previously commended you, Mr. Chairman, and do so again today on your immediate response. We were in the midst of legislation on another subject, and I was moving out for the 6 o'clock train leaving Washington, DC, on a Friday afternoon, and I passed a television monitor and saw my colleague Senator Biden on the floor making a presentation. I became a bit anxious as to why I was going north when Joe Biden was still on the Senate floor, because very frequently we ride the same train together—fortunately, I did not have the sound on or I probably would have gone to the floor to join him, but he was proposing a statute. The Supreme Court decision had come down on Wednesday, and Friday afternoon Senator Biden was on the floor with a statute. I have previously said that I thought a statutory remedy preferable. To move through the contours of the decision of the Supreme Court of the United States, it seemed to me that it was possible to do it in a statutory context to provide appropriate protection for the flag.

There is precedent, or there is wisdom among the decisions of the Supreme Court and otherwise for choosing a statutory remedy in preference to a constitutional remedy where that will do the job. There are some fascinating issues as to how to do the job within the parameters of *Texas* v. *Johnson*, the Supreme Court opinion.

Channel 10 has just joined the proceedings. I think I'll start my statement again. [Laughter.]

And there is the fascinating issue as to whether the Supreme Court opinion would be different today if the same statute were an issue. If the Supreme Court does follow the election return, or if the Constitution is what the Supreme Court says it is—perhaps the Supreme Court is what the Constitution says it is; perhaps the converse is true as well.

But I think these are significant hearings. We had a hearing in the caucus room several weeks ago where a distinguished array of witnesses appeared, and I believe this is an issue which does have importance on many levels aside from the passion of the moment, the immediate response following the flag burning, and I am pleased to be here to join you in these hearings, Mr. Chairman.

Thank you.

The CHAIRMAN. Thank you very much.

I would note of particular significance, it seems to me, is the fact that the first Supreme Court meeting one floor below this hearing room in its first major ruling on February 18, 1793, in the case of *Chisholm* v. *State of Georgia*, was reading the language of article III of the Constitution literally. The first court decision held in the case of a citizen of the State of South Carolina that that citizen was able to sue the State of Georgia.

The reason I mention that is the decision will surely echo loudly in the hearing this morning since, within 2 years of that first Supreme Court ruling, it was overturned by the adoption of a constitutional amendment, the 11th amendment, which restored sovereign immunity to the States. And today we have come full circle and need to consider whether we should take that very same course of action, whether we should overturn the decision of the Supreme Court by a constitutional amendment.

Ours, as I said, is surely a solemn task. ~~Only three~~ crystal clear times in our history—that is, with the 11th amendment, with the 14th amendment, which established by constitutional principle that blacks are citizens of the United States, and with the 16th amendment, which authorized the Federal income tax—has the amendment process been successfully invoked to overturn a decision of the U. S. Supreme Court.

As we consider the difficult task before us today, the Judiciary Committee fortunately will have the able assistance of four prominent constitutional historians, one of whom also happens to be one of the most respected Federal judges not only in this circuit but in the entire United States of America.

I asked these scholars to appear today because I believe we have an opportunity to do something that we are not always able to do in the Judiciary Committee, and that is take a step back from an issue and put it in its broad historical perspective.

This hearing enables us to step back from the passions of the moment, as Senator Specter said, and take a look at the document that, in its 200-year history, has been amended only 26 times, and really 16 times if you don't count the Bill of Rights.

I believe it is incumbent upon us to find out what it is about the Constitution and those 16 amendments that have been adopted and the amendment process itself that have made constitutional amendments such a rare phenomenon. If I'm not mistaken, roughly about 10,000 constitutional amendments have been introduced in the U.S. Congress and in the States over the years, and only 16 have been adopted since the adoption of the original Bill of Rights.

So, on behalf of the Judiciary Committee, I would like to welcome and ask to come to the witness table one of our fine Federal judges, one of the most respected jurists not just in Philadelphia but in the country, Louis H. Pollak.

Would you come forward, Judge?

Senator SPECTER. Mr. Chairman, if I might say just a word of welcome while Judge Pollak takes his seat. It is a special pleasure for me to be a party to this hearing with Judge Pollak, who was a younger law professor when I was a student at the Yale Law School. He has had a very distinguished career in academia, being Dean of the Yale Law School, later Dean of the Penn Law School and now, as you have noted, a very distinguished jurist on the U.S. District Court for the Eastern District of Pennsylvania.

The CHAIRMAN. Judge, we know that you have written extensively on the Supreme Court and the Constitution, and I'd like the record to show that we fully understand and our colleagues should be reminded that you are a recognized expert in constitutional history.

We welcome you, Judge, and apologize for the fact that we're going to apparently see microphones shift back and forth here one or two times, and after this shift they are going to stay where they are regardless if the Lord almighty came in and were to testify—with all due respect to my friends from the press.

Now, Judge, without any further comment, again welcome, and proceed in any way you feel comfortable and you think is appropriate.

STATEMENT OF HON. LOUIS H. POLLAK, JUDGE, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Judge POLLAK. Thank you, Mr. Chairman.

I count it a privilege to participate in these proceedings. I am grateful for your invitation to testify because the issues that generated this proceeding are issues of very grave consequence, I think, for the sound management of our Republic.

I do want to say in a prefatory way that I am most appreciative of your generous remarks, Mr. Chairman, and also of yours, Senator Specter. It is a pleasure, if I may put it this way, to welcome the Judiciary Committee as it travels circuit to Philadelphia. I feel that I am in a somewhat unusual situation as a sitting judge testifying before a Senate committee. That was a privilege that was mine more commonly when I was still an academic and—how should I put it—less professionally responsible than I now am.

I am intrigued by the fact that the committee has elected to have its meetings not in the historic building to the west of Independence Hall where Congress sat from 1790 to 1800, but here in the more austere environment just above the historic chamber in which the Supreme Court met.

But I think it is of particular appropriateness that the Judiciary Committee wishes to meet so close to where the Court sat, most especially when the committee is led by Senators who day in and day out, if I may say so, Mr. Chairman, have proved themselves such strong and stalwart friends of the judiciary. I would be remiss if I did not say that to you both, Senator Biden and Senator Specter.

Let me say at the outset that the question of what response, if any, of a legislative nature should be made by the Congress to the Supreme Court's decision in *Texas* v. *Johnson* is an issue of a perplexing and important dimension in my view.

The legislative responses proposed have been the statute to which you, Senator Biden, have referred; the constitutional amendment which has been tendered by Senator Thurmond and others. Both of those are legislative responses but obviously of very different character the one from the other. And the third option, of course, is to do nothing. In many ways, doing nothing may be the hardest of the options.

Justice Brandeis once pointed out, however, that doing nothing may well be the most important response to certain kinds of constitutional issue.

Given my druthers—I think it appropriate to say to you so that you will know what my views are in summary form—given my druthers, I would like to see the Congress of the United States take that third option of doing nothing.

As between amending the Constitution and passing a statute, I would strongly prefer that Congress were to undertake to move by statute rather than by constitutional amendment.

Now, having asserted these conclusions, let me try to explore with you what leads me to these conclusions.

With respect to why it would be preferable in my judgment to do nothing, I would not undertake to improve upon the eloquent statement made to your committee at its prior hearing by Senator Mathias and endorsed by others—Dean Griswold, as I recall, testified essentially in the same vein, and so indeed did, if I remember correctly, Senators Kennedy and Metzenbaum.

The reasons for doing nothing—and I will not embroider on them—I think were well set forth in the report prepared by an

American Bar Association task force chaired by Randolph Thrower and numbering among its members Dean Griswold, Dean Barbara Black, Cyrus Vance, Warren Christopher, Gerald Gunther, Robert McKay and others, a report which as I understand it has now been endorsed by the Board of Governors of the American Bar Association as of I think last Thursday.

The burden of my remarks today will be addressed most particularly to what seem to me the hazards involved in responding by amending the Constitution to a decision that causes to many the great unhappiness to which Senator Specter has attested.

Candor requires me to say at the outset that I agree with the Supreme Court's decision in *Texas* v. *Johnson*. I agree not simply in the sense that as a lower court judge I am bound by that decision. I agree in the sense that I think the majority opinion of Justice Brennan was a proper construction of the first amendment principles applicable.

I would make these brief points about the decision. First, it is notable that it was a decision affirming a decision of the Texas Court of Criminal Appeals. The Texas court had itself determined that first amendment principles required the reversal of Mr. Johnson's conviction, loathsome as Mr. Johnson's action in burning the flag was. So this is not an instance of the Supreme Court of the United State coming in and telling the State court that they had it wrong. Justice Brennan and his four colleagues were sustaining the decision below.

Second, the decision was not one which found the States helpless to interfere in circumstances involving an imminent breach of the peace. Justice Brennan was at pains to point out as the Texas Court of Criminal Appeals had itself done, that there was no demonstration in this particular circumstance that Johnson's unhappy act—despicable act, in my view—was one that was about to cause riot or other such violent response as would have warranted intervention by law enforcement authorities quite consistent with first amendment guarantees.

Moreover, of course, the flag burned by Johnson was not a flag belonging to the Texas government or the government of Dallas or indeed to any person identified in the record. It was not a matter of taking somebody else's property and burning it.

So, the decision, in my judgment, is one that operates within a very limited range of likely situations, but within the context in which it was decided, I think Justice Brennan and his colleagues were clearly correct. The decision followed it seems to me naturally, I would say even inexorably, from the Court's prior decisions in *Spence* v. *Washington* and most especially in *Board of Education* v. *Barnette* in 1943. That decision—which, as we all remember, held that public schools could not require public school students to salute the flag where those students had religious scruples against such a salute—that decision, Mr. Chairman, you will recall, was one which itself overturned a prior Supreme Court decision to the contrary, a decision by Justice Frankfurter for the Court in 1940 in the *Gobitis* case, which had held that a public school could expel Jehovah's Witness children who had religious scruples against saluting the flag.

I think it bears recollection in this setting here that the *Gobitis* case was one which arose in the Eastern District of Pennsylvania in which the district judge was Albert Maris, appointed by Franklin Roosevelt. The district judge thought the first amendment protected those public school children and so did the Court of Appeals. The Court of Appeals was reversed by the Supreme Court of the United States in the opinion of Justice Frankfurter, the opinion which 3 years later, on June 14, 1943, in Justice Jackson's historic opinion, was overturned.

Justice Jackson decided *Barnette* on Flag Day, 1943, in the midst of our greatest war. I think all of us in retrospect would have to agree that that fabled decision was testimony to the strength of our Republic. The fundamental teachings of that case have never been questioned by the Supreme Court since. And the first and last word about what that case meant and what I think *Johnson* means is Justice Jackson's statement in *Barnette*: "The case is made difficult not because the principles of its decision are obscure, but because the flag involved is our own."

So, I say with all respect, that I am one of those who thinks that *Texas* v. *Johnson* was rightly decided. I said so publicly 9 days after the decision in a ceremony that I had the privilege of presiding over 150 feet from here in front of the statue of Commodore Barry behind Independence Hall, a naturalization proceeding in which 88 new Americans pledged allegiance to the flag that floats above Independence Hall. And I welcomed them as an accretion of strength to a strong country, and in the context of their naturalization, I talked to them about the decision in *Texas* v. *Johnson* then just 9 days old. And if it would be of help to the committee, I will offer a transcript of those proceedings.

The CHAIRMAN. Without objection, the entire transcript will be placed in the record.

[Document follows:]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

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NATURALIZATION CEREMONIES : Independence Hall Courtyard
: Philadelphia, Pa.
: June 30, 1989
: 10:30 a.m.

- - - - - - - - - - - - - - - x

BEFORE THE HONORABLE LOUIS H. POLLAK
UNITED STATES DISTRICT JUDGE

SPEAKERS:	GRETA GOSZINSKI
	PEGGY MARTIN
	PETER HEARN
	ROBERT A. GORMAN
	ANNETTE CAROLYN DOUGLAS

Audio Operator: Sandy Matos

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TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE

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THE COURT: Good morning friends, I welcome you on this most beautiful of days to a ceremony of extraordinary importance, the creation of new American citizens. It is a ceremony which is special every time it is performed. But it has peculiarly important meaning today on the 30th. of June, 1989. We celebrate this as Freedom Day, very close to our national holiday, the 4th. of July. And of course, there could be no more appropriate place to make new citizens than here in Independence Square.

Before we proceed, I want to introduce to you those who are with me here in front of you. To my left and your left as we face Independence Hall is Catherine Baggiano who chairs the Citizenship Committee of the Philadelphia Bar Association.

Sitting next to Ms. Baggiano is Peter Hearn, the Chancellor of the Philadelphia Bar Association from whom you will hear shortly. And next to Mr. Hearn is Professor Robert Gorman of the University of Pennsylvania Law School from whom you will also hear shortly.

And finally, at this end of the row is the District Director of the Immigration and Naturalization Service, the Honorable Lyle Karn. I said finally, but that isn't really quite right. Really finally the person that I would introduce to you, immediately behind me is Commodore John Barry, the first commander, because he was the first founder of the American Navy, an immigrant who became a great American, who was born in Wexford, Ireland in 1745 and died in Philadelphia in 1803 after having contributed mightily to his adopted land.

And it is certainly appropriate that under the aegis of Commodore Barry we go forward with this naturalization ceremony.

I will call now on Greta Goszinski, the Naturalization Examiner to present the appropriate motions. Ms. Goszinski.

MS. GOSZINSKI: Thank you Your Honor, on behalf of the United States Immigration and Naturalization Service, I am here to make the following motions to the Court. May it please the Court, with regard to those nine petitions that were notified to appear at today's hearing but were unable to do so, it is asked that these petitions be continued to a future date.

THE COURT: That motion is granted.

MS. GOSZINSKI: Thank you Your Honor.

With regard to those two petitions, two petitioners filing for a beneficiary of age, -- less than age 14, it is asked that the Oath of Allegiance be waivered in this one case.

THE COURT: That motion is also granted.

MS. GOSZINSKI: Thank you Your Honor.

Then finally, it is a great pleasure to present in front of you today, 87 adult petitioners and two petitioners filing on behalf of their minor child. These petitioners have been tested under oath, by an officer of the United States Immigration Service and have been found to be duly qualified for citizenship in all respects. I have today personally verified that they continue to be so qualified.

Therefore, Your Honor, it is asked respectfully, that all of today's petitions and the requested name changes be granted.

THE COURT: That motion is granted.

MS. GOSZKINSKI: Thank you Your Honor.

THE COURT: Thank you Ms. Goszinski.

And now I will call on Peggy Martin, the Deputy Clerk of the United States District Court for the Eastern District of Pennsylvania to administer the oath which will make our petitioners new citizens. Ms. Martin.

I will ask that we all stand for the administration of the oath.

MS. MARTIN: With Your Honor's petition, anyone that is here to petition for naturalization, please raise your right hand to take the oath.

You hereby declare on oath that you absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty of whom or which you have heretofore been a subject or citizen.

That you will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic, that you will bear true faith and allegiance to the same, that you will bear arms on behalf of the United States when required by the law, that you will perform noncombatant service in the Armed Service of the United States when required by the law, that you will perform work of national importance under civilian direction when required by the law, and that you take this obligation freely without any mental reservation or purpose of evasion, so help you God.

The appropriate response is, I do.

Please be seated.

THE COURT: Congratulations my new fellow Americans. Welcome to the brotherhood and sisterhood of American citizenship. This is for all of you, a day of extraordinary importance. As you depart from the allegiance but not the love of your former country, and adopt the allegiance and the love of your new country, the United States of America.

Important as this day is for you, it is even important for our country. Your decision to chose the United States means a new birth of freedom for all of us, a new commitment by those electing to make a decision to join the company of men and women who are committed to the principles of equality and liberty which define our nation.

Friends, it is customary at the naturalization of new citizens here in Philadelphia for the United States District Court which governs this proceeding to be joined by the Philadelphia Bar Association. The grouping of lawyers of this city who have for so long worked for those principles of the rule of law to which our country is dedicated.

This morning we are greatly fortunate that we have with us to address you, the Chancellor of the Philadelphia Bar Association, a distinguished lawyer and one who is really uniquely qualified to talk to you and ot all of us about the values of the new status of citizenship which is yours.

It is my pleasure to introduce my friend, Peter Hearn.

MR. HEARN: I am going to start the first of just a few remarks by calling you, my fellow citizens. Usually the way public officials greet people in an audience, -- often they say at the beginning of the talk, my fellow citizens. But what it means today, this is the first time I feel the significance, the emotion of the occasion, -- certainly not as much as you do, but it feels wonderful for me to say simply to you, my fellow citizens.

I am going to ask you to do two things in the course of your lives as citizens of this wonderful republic. The first is to vote, -- maybe not all the time, but most of the time. Those of us who have been here as citizens for a long time sometimes lose track of how important that is. But every once in awhile we can see elections decided by ten, twenty, one hundred, one thousand, whatever it may be votes. Take the time, vote.

The other thing I would like to urge you to do is, every once in awhile, you probably will be asked to serve on a jury. It happens to all of us. You simply get a notice in the mail asking you to go to either the federal courthouse here or to city hall, if you live in Philadelphia County, or wherever the court is located in the county that you live, and you are asked to serve on jury duty.

And many of us find this is an interruption in our daily lives, that it would be much nicer if you didn't have to do it. But in serving on jury duty, you may be in a situation where you and some other citizens will be deciding whether a person lives or dies, whether a person is free or is placed in jail. You may be deciding the right of people to have and to exercise every day the rights that you have by reason of being a citizen.

Lawyers understand how seriously most jurors take this. They do a beautiful job. I ask when the time comes, serve on a jury. If at all possible, don't ask to be excused. Participate in the decision as to whether some other American citizen has the right to, all of the rights that you have.

I want to say once again, welcome. We love this. This great republic reaches out and has embraced you. And it is with deep significance that I close the same way I opened, by saying, welcome my fellow citizens. (Applause)

THE COURT: Thank you very much Mr. Hearn. We are also greatly fortunate to have this morning as our distinguished guest speaker another lawyer, a lawyer of equal eminence, one who is a teacher, teaches law at the University of Pennsylvania. And he has graciously consented to join with us today in this important ceremony. I am privileged to introduce my friend, Professor Robert Gorman.

PROF. GORMAN: May it please the Court, I am honored to have been asked to speak here in this most historic place, and on this most significant occasion, your naturalization as citizens of the United States. This nation is very much a nation of the foreign born, and the children of the foreign born. My father came to this country from his birth place in Turkey in 1911 when he was eleven years old.

Although that was nearly eighty years ago, he was able to tell me just yesterday of the exact date, September 6th., 1911 an of the name of the small ship on which he sailed across the ocean to this country. The name of the ship was the Martha Washington. He came into New York Harbor past the Statute of Liberty, and set foot on American soil on Ellis Island where immigrants were confronted with endless lines, endless paperwork, and initimidating medical examinations. My father's father gave his name as Gormazano. The immigration officials shortened that name to Gorman.

My mother's parents were born in eastern

Europe. They too came to the United States by way of New York City. That grandfather when he entered this county was also asked his name, but he misunderstood the question, gave an answer about his religion instead. And the immigration officials gave him the name of Cohen, -- not really his name, but the name he used for the rest of his life, and the name that he gave to my mother.

My wife's grandparents also were born in Europe and became American citizens through the process of naturalization as you have done today. Although my father in recalling those times has never spoken of the experience of his family as courageous, -- surely they were courageous. They came here as did hundreds of thousands of others and as most of you, having to learn our very difficult language, knowing no one except perhaps a handful of relatives or friends from your home land, having to find work requiring undeveloped skills in a strange economy, having to provide for your own family and perhaps even for the families of close friends, and having to leave behind what was familiar and secure about your home.

What my father and his generation did and what you are doing is indeed worthy of celebration. You have chosen to come to a new land, to become a United States citizen, to become a full participant in the life and work of this nation, even if need by, to defend and to have your children defend our way of life, should it be threatened from abroad.

Those of us fortunate enough to have been born in this country, -- my wife, and myself and our children have come to take for granted the rights that we have to a free education, to a satisfying job, to participate as voters in selecting our government, and to exercise the liberty to think and speak freely. We do not usually take the time to reflect upon how very special these rights and responsibilities and opportunities are when compared with other people and other nations around the world.

The past few months howver, have been a time when many in my generation and my children's generation have thought about the privileges of the American way of life. We have observed from a distance the winds of political change and of democracy in the Soviet Union, and in eastern Europe, and in Latin America. We, particularly those of us who are lawyers, have watched sometimes with deep disagreement our venerated Supreme Court deciding upon cases that involve our most fundamental freedoms of political debate or religious practice, and about job opportunities without discrimination because of color or race or national origin.

But it is rare, at least in time of peace that most natural born United States citizens take time to assess and to appreciate the special gifts and the special responsibilities that come with our citizenship. You are special as was my father, his family and so many of his generation in that you have made a conscious decision to claim both those responsibilities and those gifts. You have learned about the American system of government and about our Consitution. You have decided that you want to participate in that system by voting and perhaps ultimately yourself, your children or grandchildren running for elective office.

You have decided that you wish to endorse the values and the ideals of our political system, and our social system. In becoming naturalized today as American citizens you are taking a step that all of us who have been fortunate enough to be born here should take and take frequenly in our own hearts and in our own minds, even without the trappings of a formal ceremony.

Foreign born Americans, such as yourself, are contributing greatly to our politics, to our arts and culture, to our universities, to our science and industry. I learned only a few days ago that in the

City of Boston this summer, of seventeen high school graduation ceremonies there, at thirteen of them, thirteen of seventeen high school graduation ceremonies, the valedictorian, the outstanding student in the graduating class was born in a foreign land. I do not have the statistics for the Philadelphia schools, but I have no doubt that they are essentially comparable.

Those of us who remember or who have been told about the dynamic world in which our parents and grand parents grew up can look at you today, and know that we remain an open, dynamic and improving society. You are to be applauded for examining our political system and for deciding that although it is not perfect, it is the one that you choose to live under, to participate in and to make better. I congratulate you. Thank you. (Applause)

THE COURT: Thank you very much Prof. Gorman. We have been greatly privileged to hear two such moving statements as those of Peter Hearn and Robert Gorman. But we have a further privilege, one which is especially special, that we will now hear from one of the new citizens, the speaker whom I will call on will be speaking for you, you who have just become citizens of our country, and for all of us, -- all of use who belong here in America.

It is my great privilege to introduce Annette Carolyn Douglas who until thirty minutes ago, was a citizen of Jamaica and is now a citizen of the United States of America. Ms. Douglas.

MS. DOUGLAS: Well, it is indeed an honor to be here today accepting citizenship from the United States of America. I came here approximately seven years ago and to become a citizen was not my intent. I came to get an education because of the wonderful system that they have in America. The decision to become a citizen of the United States was very difficult because it not only entailed receiving all the rights and privileges, the liberties and the freedoms of a United States citizen, it also meant that I had to give up, denounce all allegiance to my country of birth, Jamaica, -- and spending my formative years in that country has endowed me with values and given me self-respect and pride and dignity in being a human being, and most importantly a black person.

When I came to this country for the first time, I experienced prejudice and it was difficult and I never knew how to deal with it. But I was also exposed to opportunities that I never would have had if I had stayed in Jamaica. And so after evaluating all the pros and cons, I have decided to make the decision to become a citizen.

I know that we are from diverse backgrounds here today, as we accept, this new found freedom and liberty. But I am sure that we could make this decision based on the fact that we have found a better life here than we would have in our country of birth. And thus, I would like to accept on behalf of all our new citizens, this certificate of citizenship, and this is our decision to denounce our allegiance to our former countries and to serve the United States of America to the best of our abilities, to be dignified citizens regardless of our color or creed. Thank you. (Applause)

THE COURT: Thank you. Thank you Ms. Douglas for your extraordinarily moving and pertinent words. Clearly we as a country are the stronger because Ms. Douglas and the other eighty-eight of you, eight-seven adults and one child, have become citizens today. And we owe, all of us owe commitment to the principles of this country, to see to it that the discriminatory patterns which Ms. Douglas encountered here in this country, as she had not in Jamaica, are sooner or later, -- and sooner rather than later -- eliminated from our nation.

It bears remembering that this year, just ~~two~~ six weeks [redacted] ago, we celebrated the 35th. anniverary of the decision of the United States Supreme Court which declared that racial segregation by law is unconstitutional, incompatible with the constitutional command of equal protection of the laws. One would wonder why it took so long for our courts to understand this simple fact. But it has finally been understood and the traces of segregation by law are progressively eliminated from our national life. But the stain of private discrimination remains and it is a stain that all of us have an undertaking to eliminate.

Having spoken of the role of courts in maintaining our Constitutional freedoms, let me tell you a little story, which is a true story, the end of which we are only understanding today. In the [redacted] the summer of 1984 in Dallas, Texas, the Republican party met to nominate candidates for the presidency and the vice presidency. And that convention renominated the incumbent president Ronald Reagan, and the incumbent vice president, George Bush.

Certain persons unhappy with the policies of the Reagan administration demonstrated as Americans do, attesting to their opposition to the policies of the government. One of those who demonstrated, a young man named Gregory Johnson, carried out his statement of opposition to his government's policies by taking an American flag, and burning it on the sidewalk outside the convention.

One passerby, witnessing what had happened, gathered together the ashes of the flag, and took them home with him, and buried those ashes in his backyard. The authorities in Dallas arrested Mr. Johnson. He was tried for desecrating a venerable object. And he was found guilty and he was sentenced to a prison term of a year and fined $2,000.

His conviction was appealed to a higher court. A higher court in Texas said, in effect, loathsome and frightening as what Mr. Johnson did, it was a statement of political opposition, and for that reason was protected by the First Amendment of the Constitution, and that court set aside Mr. Johnson's conviction.

The Texas authorities carried the case to the United States Supreme Court, the very court which as I have said in May of 1954 said that racial segregation by law was unconstitutional. The United States Supreme Court decided the Johnson case last week. It was clearly one of the most difficult cases that court has had to decide in many, many years. By a margain of five to four, -- by only one vote — ~~the justices,~~ the nine Justices concluded that the Court in Texas was correct, And that what Mr. Johnson had done, miserable an act as it was, was protected by the First Amendment, which guarantees free speech.

There are many in other countries, there are many in this country, who [redacted] find difficult to comprehend a decision permitting, as a political act, the desecration of the flag. I doubt that a majority can easily be persuaded that the Supreme Court's decision was a correct one. I will offer you my respectful view that the Supreme Court was correct.

But the important thing is not what I think about the decision, the important thing is for me to try to suggest to you why the court would so rule. The Court was enforcing what is perhaps the most sacred principle in our Constitution, the right of every person to think and speak as she or he wishes, counting on the expectation that in the long run, if there is free speech, the wisest counsels will prevail.

The Supreme Court [redacted] in 1943, [redacted] on Flag Day, in the middle of World War II, [redacted] decided that a public school could not require little children to salute the flag, if those little children felt that saluting the flag was inconsistent with their religious conviction to subordinate themselves only to God. The Supreme Court then said, "if there is [redacted] any fixed star in our Constitutional constellation, it is that no official, high or petty ~~should~~ can prescribe what ~~is~~ shall be orthodox in politics, nationalism, religion or other matters of opinion."

It was in that spirit that the majority of the Supreme Court, last week in the Johnson case, said that Johnson could not be criminally penalized for his despicable, as most of us would think it, act of burning the flag. The reason is that Mr. Johnson's action in burning the flag was to show, in the only crude way he knew how apparently, his political opposition to the government.

We live in a country uniquely fortunate to be strong enough to tolerate the widest expression of opinion. We live in a country in which it makes sense to say, as the Supreme Court said, in the opinion by its senior justice, Justice Brennan. "The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong."

Said Justice Brennan further, "We can imagine no more appropriate response to burning a flag than waving one's own. No better way to counter a flag burner's message, than by saluting the flag that burns. No surer means of preserving the dignity even of the flag that burned, than by, as one witness here did, according its remains a respectful burial."

Why do I speak to you of the Johnson case this morning? I speak to you of the Johnson case, because this morning, this 30th. of June, 1989, you have elected to become citizens of the United States. You have freely chosen to join a country with our very special Constitutional protections. You have decided that this is the strong country you want to make even stronger.

Most of us, as Professor Gorman has pointed out, are merely born here and acquire citizenship unthinkingly. It is you and others who are naturalized that make a choice, that make the choice that was described in such moving terms by Annette Douglas to us just a moment ago.

Justice Brennan said that ~~he could not imagine,~~ he and his colleagues could imagine no more appropriate response to burning a flag, than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns. I think there is one other equally appropriate response to those who would insult the flag. And it is the response that you have made this morning that ~~Y~~you have made here in this sunny courtyard, just behind Independence Hall, here as you face our flag waving over Independence Hall. You have shown for yourselves and for all of us, that ultimate allegiance to American values, which will make us all free.

Friends, our formal proceedings are now at a close. But it is now the time at which our new citizens will each receive her or his certificate of citizenship. And Ms. Martin is going to all you up each by name, so that these certificates can be conferred upon you.

Following the distribution of certificates, there will be a reception for all the new citizens and all the rest of you who are here as friends and family of the new citizens. That reception will take place in the court yard on the first floor of the United States Courthouse. The Courthouse that of course you know well, because it is the place to which you have gone in preparation for this day, the Courthouse at 6th. and Market Street, just over my right shoulder.

I will now call on Peggy Martin to call you forward individually for the distribution of certificates.

MS. MARTIN: Jon Thruong

THE COURT: Will you come forward sir.

MS. MARTIN: Keum Sun Hong, Bun Seng Lim, Thing Poren Chingdinh, Kil-Cha Chang, Annette Carolyn Douglas, Solomon Hartemichal, Neville Henderson Lokey, VonQvan, Victoria Phan, Helen America Sumbillo, Teresa Lusero Ibanez, San Hyuk Kim, Ha Rhim Leve, Louise Patricia Nicholls, Waguiha Bishay, Nelly Alcira Losacco, Ann-Marie Elizabeth Mundle, Grace In-sook Oh, Uhsha Patel, Paulette Angela Marie Thompson, Marina Lackovic, Samir Mahd Salah, Asuri Srinivasan Raghavan, Ruth Osborn, Dat Luu, Hasah Kisher Chandra Jaseba, Giordani Jean Batiste Fuat Gulduren, Weng-Kong Loke, Sonny Pham Joao Melo Pragosa, James Zhuang Huang, Alyssa Thongsouk Huang, Andrew Fitzgerald Morris, Song Su Hong, Myung Hee Lee, Isidoro Alfredo Adan, Chan Bovaraphan, Ted Van Kaczor, Jennifer Lee, Kimberly Ja Kim, Teresa Maduro Aguasa, Martinho Martins Manolico, Cecilia Farfan DePadro, Edward Vann Chhay, Min Sook Kim, Ky Sinn Ly, Molly Soondar, Peter Hay Suon, Channalie Suon, Simiona Pagan Katindig, Sang San Ho, Sroy Tran, Kevin Ho, Kroeurn Sidnie Oum, Christina Sue Ho, Hareshkumar Patel, Jeffrey William Scott, Sandya Vijay Kumarthaker,Au Ding Lieu, Cordelia Chinwe Nweze, Victoria Petrescu, Pinchom Jhasinthana Mumanachit, Timothy Shang Chang, Patricia-Ann Julia Claybrook, Giovanni Losacco, Yana Shamaev, Alcina Mendes, Winston Ashburn Henry, Hessam Homayounian, Loan Xhan Laursen, Myriam Diez, Anil Harkishandas Patel, Demissie Bekele Tessema, Khang Whi Khang, Marcelo Camelon Jamil, Sothy

Chen, Hollis Elkington Williams, Aronas Mulerie, William Eir, Andrew Lee, Lina Maria Martins Dos Santos Manolico, Stephen Tsing, Veronicia Bryson, Paul Hoang Truong, Andreas Konstandinos Giannousis, Sushilaben Jayantibhai Patel.

Is there anyone here that I didn't call? (No response) Thank you and congratulations.

THE COURT: Congratulations to you all. Do remember that there is a reception over at the federal courthouse, in the courtyard there. Good luck to you all.

* * *

Chan, Hollis Elkington Williams, Aronas Muleris, William Eir, Andrew Lee, Lina Maria Martins Dos Santos Manolico, Stephen Taing, Veronicia Bryson, Paul Hoang Truong, Andreas Konstandinos Giannousis, Sushilaben Jayantibhai Patel.

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* * *

I, THERESA GRIBBEN, do certify that the foregoing is a true and accurate transcript of the Naturalization Ceremony.

July 17, 1985

Theresa Gribben

Judge Pollak. I appreciate that my view of the *Texas* v. *Johnson* case, though shared by some, is not shared by all. Judge Bork, for example, most emphatically advised your committee that he thought the Supreme Court was wrong in the *Texas* v. *Johnson* case.

The contrariety of view among persons whose judgment is certainly entitled to respect points, as does the history of *Barnette*, overturning *Gobitis*, to a related and very important dimension of this problem. The amendment process as adopted by the Founders was perceived quite clearly as the instrument for adapting the Constitution of the United States to the changes unforeseen and unforeseeable that future history would call into being. To that end, as Madison put it in the 43rd Federalist, the complex amendment process was one which was designed to guard "equally against that extreme facility which would render the Constitution too mutable and that extreme difficulty which might perpetuate its discovered faults."

What the Founders had probably not fully anticipated was that the Supreme Court itself would in the course of its extraordinary institutional development become in effect a vehicle for modifying, liberating, derigidifying the Constitution as occasion called for, but always within the main lines of the principles embodied by the framers in the great charter.

The point is important because the sequence from *Gobitis* to *Barnette*, a sequence in which the Supreme Court ultimately vindicated the lonely judgment of Judge Maris—that extraordinary jurist who died just last February after 52 years in Federal judicial service, the senior judge in the history of the United States—that process, if it please you, Mr. Chairman, is one in which the Supreme Court undertakes to correct its own errors, and it has done so on many, many occasions. And if we were to assume with Judge Bork that the decision in *Texas* v. *Johnson* is constitutionally flawed, the Supreme Court is open and available for reconsideration as reconsideration may be called for.

What I would urge respectfully on this committee is that the process of amending the Constitution is one which is conventionally reserved for major issues, restructuring those processes that are fundamental in the management of our democratic enterprise. I submit that the case before us does not qualify by that standard.

Mr. Chairman, you have referred already to three instances in which constitutional amendments have played the role of remedying Supreme Court decisions that clearly were lamentable. The first was *Chisholm* which, as you pointed out, Senator Biden, was decided right below us in the Supreme Court Chamber in 1793 and was remedied by the 11th amendment. The second was *Dred Scott*, which was corrected by section 1 of the 14th amendment, reciting that all persons born or naturalized in the United States are citizens thereof and of the States in which they reside. That overturned Chief Justice Taney's infamous dictum that no black, slave or free, could ever be a citizen of the United States. The 16th amendment overturned the *Pollock* case holding that Congress could not enact an income tax—modesty requires me to disconnect myself from the *Pollock* case.

There is a fourth instance which may belong in this same category, Mr. Chairman. The 26th amendment, the most recent amendment, lowering the voting age to 18, was an amendment which, as you will recall, undertook to overcome the difficulties presented by the Supreme Court's response in *Oregon* v. *Mitchell* to the statute passed by Congress in 1970 which undertook as a matter of ordinary legislation to lower the voting age to 18. I take the liberty of reminding you of that sequence. There was virtual unanimity on the merits in 1970 that the voting age should be lowered to 18. Some students of constitutional law, notably including Profs. Archibald Cox and Paul Freund of Harvard, felt that ordinary legislation could lower the voting age. There were others who took a different view, and I was one of them. I took the view that a constitutional amendment was required to accomplish that purpose. And on that score——

The **Chairman**. I have become accustomed of late to realize that opinions emanating from the Yale Law School have taken precedence over those from Harvard Law School, or at least the last year and a half.

Judge **Pollak**. It is curious, Senator Biden, because it turned out that the Yale view, if I may take the liberty of identifying myself with that institution for that purpose—although it was obviously not an official view, but I may say it was shared by the late Professor Bickel—that was a conservative view as distinct from a perhaps more liberal view taken by our colleagues at Harvard.

In the event Congress did pass a statute over the protestations of your colleague Senator Thurmond and others that only an amendment would do—I think Senator Thurmond was surprised to find me in the camp of those who agreed with him—the result was a decision by the U.S. Supreme Court which said, well, the legislation is effective as to Federal elections but not as to State elections. That was the result of a peculiar split in the Court, four thinking that the legislation was entirely constitutional, four that it was entirely unconstitutional, and Justice Black holding the balance, announcing a decision that no one had anticipated including, I believe, Solicitor General Griswold, as he then was, who argued the Government's case.

The result was what, quite frankly, I had suggested to this committee was a possibility, that the unfortunate statute created serious difficulties with the voting process, and one had to find a remedy right away since nobody could see a way of bifurcating State and Federal elections in any meaningful sense. The result was the adoption within a matter of months of the 26th amendment. So, in that sense, *Oregon* v. *Mitchell* belongs in the category of cases to which you have adverted, Senator Biden. It was not a decision by the Congress that the Supreme Court had been wrong, but that the decision that had been made required constitutional rectification.

In my judgment, what we have before us today is not a problem comparable with the 26th amendment problem. This is not a case in which one should turn first to constitutional surgery. If it is the considered view of the Congress of the United States that the result in *Texas* v. *Johnson* is not one that should be permitted to be perpetuated, then I would urge that the Congress address itself to statutory mechanisms, although there is clear difference of view as reflected in the testimony before your committee as to what the effectiveness would be of statutory proposals. I will not rehearse that disagreement, and it is not perhaps appropriate for me to be discussing the advisability of one rather than another statutory remedy.

But I think it clear that this is a situation in which to move first to revising the Constitution rather than to undertake a statutory remedy would be to grasp the nettle where there is no compelling reason to do so. This is not a situation in which, as a result of the Supreme Court's decision, any national responsibility, such as the holding of orderly elections, is put in serious disarray.

Now, what are the other circumstances in which the Constitution has been amended? Are they not in great measure also situations of commanding importance, at least as perceived by the legislators and the public of that day?

There have been 33 amendments proposed by the Congress to the States; 26 of those have been adopted by the States. What are those 26 amendments? The first 10 are, of course, the Bill of Rights and the 9th and 10th amendments. Then there was the 11th amendment that took care of *Chisholm;* the 12th amendment that addressed the election process for the Presidency and the Vice Presidency, obviously matters of highest national importance; and then almost half a century went by before the next amendment was adopted, and that was the 13th amendment, the slave emancipation amendment, followed quickly by the 14th and 15th, all of them responses to the Civil War.

In the meantime, there were four amendments proposed by the Congress which were rejected by the States. As is not often recalled, there were two amendments submitted along with the Bill of Rights that were rejected. They would have been amendments 1 and 2 had they been adopted. One related to the size of the House of Representatives, obviously a matter of major consequence, and the other related to the compensation of members of Congress, which I think might also be regarded as a matter of some enduring importance, and neither of those was ratified.

In 1810, Congress submitted a proposed amendment that would have withdrawn the citizenship of a person who accepted a title of nobility from a foreign power. That was rejected. So, too, was an 1861 amendment—we remember it too seldom—which would have embedded slavery into our Constitution permanently, preventing its removal except with the assent of all States in which slavery existed.

Since that time, the amendments following the Civil War amendments have been the 16th, addressed to the income tax; the 17th, restructuring the voting process for Members of the Senate so that you, Mr. Chairman, and you, Senator Specter, are now directly elected; followed by the prohibition amendment; the enfranchisement of women in the 19th amendment; and then the 20th, 21st and 22nd, dealing respectively with the "lame duck" term of Congress, eliminating that, the repeal of prohibition, and the prohibition on the re-election of a President for a third term.

Finally, we come to what I may call the present day, the amendments which have given three electors to the District of Columbia in Presidential elections; the 24th amendment, abolishing the poll tax in Federal elections; the 25th, with respect to Presidential disabilities and succession; and the 26th, which we have already discussed, reducing the voting age to 18. All of these, matters of large consequence, indubitably. And so too with the amendments which have been rejected in this era. They are: the child labor amendment; the equal rights amendment; and finally, one amendment not yet rejected but in limbo, awaiting either rejection or ultimate ratification, the amendment which would give to the District of Columbia representation in the House and in the Senate on a voting basis.

As contrasted with these major changes in the structure of our country or in the powers of our country—I think now of the income tax amendments—and saving out the lamentable effort to impose prohibition on our Nation, which wound up in repeal, I think it clear that the amendment process has been reserved, as Madison anticipated, for matters of substantial consequence.

Errors that can be dealt with in lesser ways than restructuring our country ought to be dealt with in those ways.

I have proceeded up to now, Mr. Chairman, as if the Bill of Rights which it is proposed to amend were simply part of the general category of amendments to the Constitution on a par with the 16th, the 18th, the 22nd and so forth. But as your own remarks made plain, Mr. Chairman, the Bill of Rights is something more. It was embodied in our Constitution in response to a felt promise to remedy the deficiencies of the Constitution as originally proposed. It was embodied in the Constitution in direct reply to demands from several of the ratifying States for immediate consideration of the addition to the Constitution of a Bill of Rights. Those were the terms in which James Madison, Congressman from Virginia, rose in the well of the House of Representatives in that summer of 1789 to propose the Bill of Rights.

The importance of the Bill of Rights would be a matter of impertinence to try to dwell upon. I would simply say that of the many liberties enshrined in the Bill of Rights, the most precious is probably the group of liberties embodied in the first amendment, which it is now proposed should be qualified in some measure by constitutional amendment.

Justice Cardozo made the point plain in his opinion in *Puolko,* in which he canvassed the various liberties embodied in the Bill of Rights and considered which of them qualified for enforcement against the States via the 14th amendment. He noted:

> We reach a different plane of social and moral values when we pass to the privilege and immunities that have been taken over from the earlier Articles of the Federal Bill of Rights and brought within the 14th Amendment by a process of absorption. If the 14th Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. This is true for illustration of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.

To modify the first amendment would be to enter upon a course, Mr. Chairman, that this Republic has never pursued before. And I would point out by way of comparative illustration that the constitutions of your State, Mr. Chairman, and your State, Senator Specter, are constitutions which, though reviewed and revised over the years and over the decades, are with respect to their provisions guaranteeing freedom of speech virtually verbatim what they were in the 1790's contemporaneously with the Bill of Rights. So that at the State level, too, the instinct to keep our constitutions as they were remains immensely strong.

Mr. Chairman, in this volume, which is unhappily so fragile that it can hardly be read except very carefully, page by page, are the Annals of Congress for 1789. In that first volume of your proceedings are recorded the debates on the Bill of Rights. To be precise, what is recorded are the debate in the House of Representatives, not in the Senate, because for reasons that perhaps, Senators, you are privy to and I am not, your deliberations were not public until 1794.

The **CHAIRMAN**. It seemed to have been a matter of class at the time.

Judge **POLLAK**. I assume that when I said they were not public that there probably also was not radio and television coverage.

Mr. Chairman, on August 15, 1789, the House of Representatives sitting as a committee of the whole adopted in principle the first amendment. On September 24, 1789—which was, incidentally, the day the first Judiciary Act went into effect—Congress completed action on the Bill of Rights and transmitted it to the President of the United States for distribution to the States for ratification.

I urge you, Senators Biden and Specter, not to commemorate the 200th anniversary of the House of Representatives' action on the Bill of Rights, and most specifically on the first amendment, adopted in principle 200 years ago tomorrow, I urge you not to celebrate that anniversary by submitting to the States a proposed amendment which would dilute the protections of the first amendment.

The **CHAIRMAN**. Judge, thank you very, very much.

Your last point is where I'd like to begin in my questioning, and what we will do since Senator Specter and I have such respect for one another, I think rather than have any kind of rule, which we usually do, of questions, just to interrupt as we go along and to interject if you wish to pursue a question that has already been asked.

Let me begin, as I said, where you ended, which is, it seems to me, the gravement of the issue here for most of us. That is, if we were to propose the President's or Senator Thurmond's amendment to the Constitution, are we in fact amending the first amendment? Are we doing something that changes the first amendment in any significant way? And let me elaborate slightly.

The proponents of the President's constitutional amendment—scholars and the administration witness who testified on behalf of the President—argued that the President's amendment, Senate Joint Resolution 180, was preferable as opposed to "Biden's neutral statute"—by "neutral," I mean the statute as written says, to oversimplify it, flag burning is unlawful, period, whether you do it in your cellar, all by yourself, or you do it in public before 500,000 people, burning the flag in and of itself is against the law. They argue that even if my proposed statute were constitutional, they said—and I think I am quoting—"That's not what we want," meaning that's not what the President wants.

They went on to point out that what they really want to do in this statute is allow the States individually to decide what is contemptuous conduct as it relates to the flag. And once that determination has been made by an individual State as to what is contemptuous conduct, let each of the individual States, having set that standard—so we could theoretically have 50 different standards under the President's proposed constitutional amendment—allow the punishment to be determined by each individual State.

They argue that the neutral statute—as I said, by neutral, I mean a statute that imposes a flat ban on the physical destruction of the flag—does not give legislators the power to decide what they find contemptuous. It just doesn't go far enough, they argue. As one of the witnesses at our hearing, Charles Cooper, asked rhetorically, "Even if it is constitutional, does anyone really want a neutral flag desecration statute?"

In other words, the argument by those who support this particular amendment, the President's amendment, is that it is the only way legislatures will be able to pick and choose among the views it agrees and disagrees with, allowing them to punish the latter and not the former.

Now, in terms of the constitutional history of this country, what are the implications of adding an amendment to the Constitution that gives legislatures this kind of power and discretion to choose what it finds contemptuous and what it finds to be not contemptuous as it relates to speech?

Judge **Pollak**. I think, Mr. Chairman, the problems posed by a constitutional approach of that kind are very grave indeed. First, I think there can be no question that however denominated, the proposal for constitutional amendment offered by Senator Thurmond operates and is meant to operate as a qualification of the first amendment as the first amendment has been authoritatively construed by the U.S. Supreme Court.

Second, to the extent that the proposed amendment is one which would, as you suggest, give discretion to the States to come up with variable standards of contumaciousness in addressing the flag, that offers the further and very perplexing potential for leading to a situation in which the scope of free speech as reflected in demonstrative activity using the flag as a focus of violent abuse, the scope of that could vary from State to State to State across the breadth of our land.

The idea that freedom of speech would become not merely a modified commodity but so significantly variable a commodity strikes me as a very dismaying constitutional phenomenon.

The **Chairman**. For the record, the proposed amendment reads: "The Congress and each State shall have the power to prohibit the physical desecration of the flag of the United States of America."

Essentially, it requires enabling legislation. So as I read this statute—and correct me if I am wrong—the State of Pennsylvania could determine by statute that having a caricature of the American flag on any commercial product constituted desecration in the State of Pennsylvania. And the State of Delaware could conclude that desecration only constituted the physical burning of a piece of cloth that depicted the flag, that was the flag. And the State of Maryland could conclude that the use of the flag in any parade or function that was not one that was conducted by one of the two major political parties constituted desecration of the flag.

Am I misreading what could be done under this constitutional amendment?

Judge POLLAK. I don't think you are, Senator Biden. I suppose that we cannot say for sure that that is how the amendment would be construed, but I think what we can say with confidence is that with an amendment phrased in the fashion that you have just read to us, we could anticipate a decade or so of active litigation in which cases would arise in many quarters of the country—assuming for purposes of discussion that the basic activity were to be undertaken by many people—that there would be litigation which would ultimately go to the Supreme Court and which it would be the job of the Supreme Court to decide whether the term "physical desecration" as used in the proposed amendment, and we now assume the adopted amendment, was a term which itself had a single national definition, whether that was the intent of Congress in submitting the amendment to the States, or whether, as you have suggested the verbiage is perfectly susceptible of meaning, whether physical desecration was in turn a phrase that each State was invited to define for itself.

The CHAIRMAN. My understanding is that it is not meant to have a single, overreaching definition based on the testimony, but I'll have to go back and check that.

Let me ask one more question and then yield to my colleague, because there are so many questions I would like to ask.

One of the comments made by the administration witness and others who testified in support of this particular amendment, what I believe to be especially broad and ill-defined constitutional amendment—I for one should, as they say, put my cards on the table as well; I certainly am not the constitutional scholar that you are, but after having spoken to many of your colleagues and spent more time on this issue than I ever contemplated as a law student I would ever be spending on this issue, I have come to the conclusion that it is possible to draft a constitutional amendment that does not do the violence that this potentially does. But this particular amendment I find increasingly disturbing as I get further into this subject.

My question is this. We were told in the testimony from the last hearing that essentially all this amendment—by "this amendment", I mean the President's amendment—all it really would do is put the States back in the position they were prior to *Texas* v. *Johnson*. Now, that sounds fine except that it seems to me that prior to *Texas* v. *Johnson*, most State legislative bodies understood full well that they were trespassing perilously close to impacting upon freedom of speech. And as a consequence, they in most cases were somewhat circumspect, and I would say "conservative," in the way in which they attempted to "protect the flag". But with the passage of this amendment, it would seem to me that any such inhibition on the part of State legislative bodies would be lifted.

So my question is this: Would the adoption of a 27th amendment as enunciated by the President and read by me a moment ago, merely put us back to where we were prior to *Texas* v. *Johnson*, or would the circumstances be changed?

Judge **Pollak**. In my judgment it would not simply put us back where we were prior to *Texas* v. *Johnson*. On June 20 of this year, a day before the decision in *Texas* v. *Johnson*, in my judgment a constitutional scholar undertaking to predict how that case would be decided would have anticipated that there was a very substantial likelihood, based on the understanding of the Constitution presented by the Supreme Court in *Barnette* and in *Spence v. Washington* and in other cases, that the decision of the Texas Court of Criminal Appeals overturning Johnson's conviction would be affirmed.

I don't mean that the issue was clearcut. There certainly was room for a contrary view, and it was a contrary view that was reflected in the dissenting opinions in *Texas* v. *Johnson*. But I would say that the weight of authority the day before the decision was handed down was to the effect that this is indeed what the first amendment means in this context and that State legislatures trying to advise themselves on the issue would have understood, as the Texas court said and as the Supreme Court majority said, that situations in which flag desecration are calculated to bring about immediate breaches of the peace were copable with by the breach of the peace statutes which every State has, including Texas.

So, I think the clear answer to your question, Senator, is that this is an amendment which would do far more than simply generate the status quo ante and would be an invitation to legislatures to roam far more widely than any of them had supposed they could.

The **Chairman**. If time permits—and I am sure that Senator Specter, based on his notations on the *Texas* v. *Johnson* decision, will get into this—we should discuss that decision and the detail of that decision.

But let me for the record point out that I was correct when I indicated that I thought the administration was not proposing that there be a single national standard for what constituted physical desecration or even, for that matter, what constituted a flag. Assistant Attorney General William Barr, testifying on behalf of the administration, said:

> The amendment would define the framework within which the legislative authority of the Congress and the States could be exercised. Within this framework, however, the Congress and the States would have wide latitude to prohibit that conduct toward the flag that they believe deserves proscription. If Congress and the States choose to legislate, as we anticipate they would, they would be permitted and obliged to draw lines. For example, they would have to determine how they wish to define "flag" and "physical desecration of the flag"; they would have to decide whether to make intent a necessary element of flag desecration offenses. Doubtless there would be other questions as well.

I yield to my colleague from Pennsylvania.

Senator **Specter**. I am inclined to think that there won't be time for everything today. I had originally planned to leave at 11:00 and deferred it until 12:30, and now I wonder with the array of witnesses we have how far we will get, because the issues are so deep, profound and perplexing.

At the outset, I would disagree with two things that have been said, one by the Chairman and one by Judge Pollak. One, Senator Biden said he was not a constitutional scholar. I have to disagree with that. I have seen him on the Judiciary Committee for 9 years now, and 3 years as its chairman, and he knows a lot more than he knows he knows. He has been very deeply involved with constitutional issues for a long time and is very much a master of the subject and very innovative on the subject.

The **CHAIRMAN**. Thank you.

Senator **SPECTER**. And I disagree with you, Judge Pollak, when you say that doing nothing may be the hardest thing for the Congress to do. We are experts at that subject. [Laughter.]

Our colleague Senator Symms of Idaho, a libertarian, says: "The Congress is adjourned; the country is safe, temporarily."

Judge **POLLAK**. I didn't mean to sound as if I were generalizing.

Senator **SPECTER**. Judge Pollak, there are five subjects that I would like to take up today. I don't know how many of them we will get to. But I would articulate these as the issues. Was the Supreme Court decision in *Texas* v. *Johnson* correct? Second, would the Supreme Court render the same decision tomorrow? Third, should a statute be tried before constitutional amendment? Fourth, what are the public policy considerations to warrant legislative action? And fifth, would a statute pass constitutional muster?

Let me start with the first, was the Supreme Court decision correct. Judge Pollak, the parameters of the first amendment have been held repeatedly by the Supreme Court of the United States not to be absolute; that where you have a clear and present danger, speech is prohibited, inciting to riot, shouting "Fire" in a crowded theater, where you have obscenity, a complex subject, speech is not absolute, where you have libel, speech is not absolute—in a variety of contexts.

One of the most famous Supreme Court decisions is *Chaplinsky* v. *New Hampshire*, which was cited extensively by the dissenting opinion. I think it worth noting, as you have outlined the array of scholars opposed to a constitutional amendment, that in the Supreme Court dissent, Chief Justice Rehnquist notes, among others, Chief Justice Warren felt that the decisions on the flag by the Supreme Court were wrong, but that he thought it could be constitutionally protected, as did Justice Hugo Black, one of the greatest civil libertarians in the history of the country, and Justice Abe Fortas, also very distinguished in that area. But the *Chaplinsky* case is an interesting place to start, although we could start many, many places.

Chaplinsky was convicted, and the conviction was upheld by the Supreme Court of the United States, when he said to a local marshal, "You are a goddamned racketeer" and a "damned fascist, and the whole government of Rochester are fascists or agents of fascists". He had been convicted under a statute which had prohibited the statement of "addressing any offensive, derisive, or annoying word to any person who is lawfully in any street or other public place."

That kind of a statute might well be equated with flag burning. But the point I want to start with, because there are so many tough issues in the confines of what we are discussing, in the Supreme Court opinion, this statement was made in *Chaplinsky:*

> It has been well-observed that such utterances are no essential part of any exposition of ideas and are of slight social value as a step to truth that any benefit that

may be derived from them is clearly outweighed by the social interest in order and morality.

My question to you is do you regard a first amendment decision as a balancing, as the Supreme Court in *Chaplinsky* articulated, a weighing test?

Judge POLLAK. Senator, without questioning the holding in *Chaplinsky,* my feeling is that if that case were revisited today, one might very well reach the same result, but that the Court's analysis would not be quite the same. I doubt that the Justices would say that language of the kind used by *Chaplinsky* is not speech within any constitutionally understood criterion but rather that language, whatever it may be, that is used in such a circumstance as to almost to a certainty generate the likelihood of violent response is language that the Government can intervene to prevent or to punish when articulated.

Senator SPECTER. Well, wouldn't this language likely produce a violent response?

Judge POLLAK. I think that is what the Court meant when it talked about fighting words.

Senator SPECTER. If someone in North Philadelphia, in a racially tense situation, uttered a racial slur, and the person spoken to punched the speaker in the nose, and they tried to prosecute the puncher for assault and battery, that conduct would doubtless be justified as appropriate response for a racial slur.

Judge POLLAK. That is very likely what the result would be. Obviously, there are delicate questions in there of situations in which a speaker is entitled to some range of protection as he deals with controversial matters, but at the border when he says the kind of thing that immediately triggers a violent response, the first amendment protection, as you rightly said, simply disappears.

Senator SPECTER. Well, Judge Pollak, although you have articulated your preference for the Court's ruling in *Texas* v. *Johnson,* and noting that it is a five-to-four opinion, do you think it entirely possible that the Court might have reached a different decision or might reach a different decision if it were to take up the question tomorrow?

Judge POLLAK. I think it, of course, was possible for the Court to have reached a different decision. The closeness of the margin demonstrates that. The issues are not easy ones. I offered it as the likely prediction on June 20 that the case would be decided as it was. But I can certainly see an opposing point of view, and it was the one well articulated by the Chief Justice and by Justice Stevens.

When you ask whether I see any likelihood that the Court would reach a different result tomorrow, or when they go back into session in October, the answer to that, Senator, I think is no. I see no reason to expect such an immediate turnaround. But I certainly would not put aside the possibility that the Court as differently constituted, or conceivably, the Court as currently constituted, could after the sober second thought that might come from further litigation in a different context come to a different point of view.

I think it improbable, quite frankly, that within the short term these same nine Justices would simply reject what had been decided there, but I do point to the *Gobitis/Barnette* example of a Court changing its mind, albeit a reconstituted Court, within a very short time.

Senator **Specter**. I'm going to come to that question, but I'm going to reserve that for a later panel because we have so many witnesses and take up the question of the same Court having reversed itself, Justice Roberts in the *Parrish* case and some other cases. But I want to touch on one other subject with you, Judge Pollak, before you go, and this is the last question I have. It goes to the subject of what is an appropriate subject matter on public policy grounds to legislate.

We all very highly prize the first amendment freedoms, the freedom of speech and religion and press which is embodied in the first amendment, and none of us wants to tamper with it. We have against that a background of very learned libertarian justices, carving out exceptions to the first amendment—clear and present danger, obscenity grounds, fighting words, and a variety of contexts.

There is a very thoughtful opinion by Justice Stevens in dissent. He declined to join with the opinion of Chief Justice Rehnquist and Justice O'Connor and Justice White. Justice Stevens said this about the American flag: "It is more than a proud symbol of the courage, the determination and the gifts of nature that transformed 13 fledgling colonies into a world power"—can I read this as opposed to the Rehnquist recitations of poems and flags, because I think what Stevens said here really goes to a value as opposed to the emotional content. He talks about the flag as a symbol of freedom, opportunity, religious tolerance, good will, and a symbol carrying its message to people in this country and around the world. And a Senator cannot be oblivious to his constituents' interests, now that Senators are directly elected, as you know—nor should Senators be oblivious to their constituents' interests. And as I said, my own initial reaction was not favorable. But where you have a very strong feeling of the American people which I believe is present—and I don't say that in the abstract; I say that having had a series of open house town meetings across this State since the decision came down, but there is a different feel to the matter now as opposed to the outpouring of emotion. It is more reflective; people are thinking about constitutional values and are willing to settle for, I think, a statute or for appropriate flag protection. And noting that 48 of the United States have statutes prohibiting flag desecration—they said they don't have them in Alaska and in Wyoming because they don't need them; if somebody desecrates the flag in Wyoming or Alaska, you don't need a statute to see that justice is done.

But I would ask you, putting yourself in the position of a legislator, a United States Senator, what are the values that you would think as a matter of public policy warrant legislative action, and aren't they really involved in this situation?

Judge **Pollak**. Well, Senator, I want to respond with some caution because first of all, there is an act of impertinence in thinking of myself as a Senator—though when I think back to yourself in your student days, Senator, I think that I at least was wise enough to know that there was a likely legislator who was in the classroom——

Senator SPECTER. You were the only one, then.

Judge POLLAK. I seem to have been joined by some others.

You have pointed to Justice Stevens' separate opinion, and it is, as so many of his opinions are, a work of, I think, extraordinary eloquence and perception and has to give one pause—even one who, as I have said I am, is persuaded that the majority of the Court was right. But I think I understand that the values that the Justice was talking about are values that could reasonably be of importance to a Senator in considering what an appropriate response is to a decision that is obviously greatly unsettling to many people.

I believe that on balance, I would come to the conclusion that as tempers recede, as you have suggested they already in some sense are, it makes sense to wait longer before moving even by ordinary legislation.

Nonetheless, I can recognize reasons for a contrary judgment, and the reasons seem to me ones that you have identified.

Senator SPECTER. But after you wait, Judge Pollak, you are in the U.S. Senate, and they've just finished the M's and the L's and they come to the P's, and it is aye or nay—how do you vote?

Judge POLLAK. I would vote nay, Senator, but I would have great respect for those who voted the other way.

Senator SPECTER. You wouldn't be a single-issue voter if I disappoint you on this issue, would you?

Judge POLLAK. I think that is true. I would also say, Senator, that with respect to the process of revisiting the issue by the Supreme Court, if one anticipates that further litigation would flesh out the possibility of different perspectives, although I don't expect this Supreme Court to look differently on this issue as presented tomorrow or next month or even next year, I feel obliged to say that the Supreme Court of the United States most certainly would feel itself institutionally obligated to take a closer look at a statute passed by the Congress than at a statute passed by the legislature of Texas or Rhode Island or even Wyoming and Alaska—and with no disparagement to our system. The Supreme Court properly has been far more deferential to legislation which is a product of the national legislature and the national perspective, and the findings that might accompany such national legislation would, of course, be findings which the Court would give respectful attention to, whether ultimately they decided that that was dispositive favorably or not dispositive favorably with respect to the constitutionality of such legislation.

The CHAIRMAN. Judge, would you as a Senator vote against the statute because you thought it unnecessary or distasteful, or because you thought it unconstitutional? That may not be an appropriate question to ask you now that I think about it.

Senator SPECTER. That's a terrific question. I wish I had thought of it.

Judge POLLAK. It is a good question.

Senator SPECTER. If he won't ask it, I will.

Judge POLLAK. I think it is a very good question, and I think it is a question that I am paid not to answer in this forum.

Senator SPECTER. Suppose we raise your salary, Judge? [Laughter.]

Judge **Pollak**. That unlikely contingency, Senator, would increase my resistance to respond. [Laughter.]

The **Chairman**. The reason, I should state for the record, that I think after having asked, it is probably not appropriate, is because it may very well be if we pass such a statute that you might have to decide on the constitutionality of such a statute right in this jurisdiction.

I would argue that the statute is constitutional, and let me ask you just one question about the *Johnson* case, and then—as we have trespassed on your time too much—we will let you go.

Justice Brennan in his opinion for a majority of the Court repeatedly makes reference to the need for there to have been a communicative impact for Johnson to have been found guilty of anything under the Texas statute. That is, had the witnesses to the flag burning not been offended, had they not thought him casting contempt upon the flag, then he would not be able to have been convicted under the Texas statute, as I read the conviction.

My question to you is how parochial is this decision. Does it relate specifically to the Texas statute where it requires a third party to have been impacted in some way, or is it as broad as some are suggesting that it is, and that is under no circumstances could any State statute that exists now—and I have not surveyed all 48 of them—but no State statute would be able to pass muster under this decision?

Judge **Pollak**. Senator, I don't pretend to know the variety of phrasings of the other State statutes. I think what Justice Brennan's opinion condemns is a prosecution in which an ingredient of the prosecution is that the action taken to abuse the flag is communicative in nature, and that might be a particular aspect of the statute or it might be an aspect not mentioned in the statute but part of the burden that the prosecution undertakes in bringing the case.

To the extent that the Supreme Court sees what is sought to be accomplished as a suppression of abuse of the flag because the abuser is trying to get a point across that way, a point of some political or moral or whatever nature, that I think is the focus of the Court's opinion. If it is a random destruction that could as easily be pulling down a curtain as pulling down a flag, or pulling a tablecloth off of one of the tables at which we were meeting, without any attempt to address the particular symbolism of that object, then I think we are not in a first amendment area at all.

The **Chairman**. It says, "The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others."

Well, I want to thank you, Judge, for giving us so much of your time and your wisdom. With your permission, the committee would like to be able to submit some questions to you in writing. They will not be voluminous, but if it is possible we would appreciate your responding to what will probably be about half a dozen questions, if that is possible.

Judge **Pollak**. I would be glad to undertake to respond, Senator, and I thank you very much for the privilege of participating.

In closing, I ask you once again to think about Congressman Madison, just across the way in Congress Hall, and the work that he was doing two centuries ago this very day.

The CHAIRMAN. That is why we are here, Judge, and hopefully we will ultimately demonstrate as much wisdom as he did.

Thank you very much.

[The questions of Judge Pollak follow:]

Questions for Judge Pollak from Senator Biden and
Responses by Judge Pollak to Senator Biden's Questions

QUESTION 1:

WHAT EXPLAINS OUR NATION'S RELATIVELY SPARING RESORT TO THE AMENDMENT PROCESS? WE HAVE, AFTER ALL, AMENDED THE CONSTITUTION ONLY 16 TIMES SINCE THE FIRST 10 AMENDMENTS -- THE BILL OF RIGHTS -- WERE ADOPTED 200 YEARS AGO. IS IT SIMPLY A FUNCTION OF THE DIFFICULTY OF THE AMENDMENT PROCESS, OR DOES IT ALSO REFLECT A TRADITION THAT THE FUNDAMENTAL LAW OF THIS NATION SHOULD NOT BE FREELY AMENDED?

Response to Question 1:

It is not easy to amend the Constitution, but the process is not so complicated as to foreclose constitutional change when important national purposes require such change. It is true that in our entire two centuries under the Constitution there have been only twenty-six amendments (including the first ten, which were virtually a part of the original document). But it is important to note that in that same time span only seven proposed amendments that made their way through Congress have not been ratified by the required three-fourths of the states.* This means that the ratification obstacle course has been successfully traversed in an impressive 78% (twenty-six of thirty-three) of the instances in which there was a strong enough Congressional consensus in favor of constitutional reform so that two-thirds of both Houses supported an amendment. On the other hand, the thirty-three instances in which Congress proposed amendments to the states represent fewer than one percent of the upwards-of five thousand draft constitutional amendments which members of the House and Senate have put in the hopper since 1789. This signifies that Congress -- the entity which is the institutional embodiment of national consensus -- has, by and large, reserved the amending process for problems of national importance which can only be dealt with by changing the Constitution. The first ten amendments, amendments thirteen through seventeen, and amendments nineteen and twenty-six, are good examples. By contrast, the eighteenth amendment furnishes an example of an inappropriate resort to the amending process; and that amendment was repealed.

*Six failed of ratification and the seventh (the proposal that the District of Columbia have voting representation in the House and the Senate) has not yet been voted up or down. Of the six that failed of ratification, the Child Labor Amendment and the Equal Rights Amendment were proposals which, in my judgment, clearly qualified as proper subjects for the amending process.

In short, amending the Constitution is a last resort mode of political reform. To amend the Constitution to achieve minor ends, or in situations where ordinary legislation would do the job just as well, is to disrespect the Constitution.

QUESTION 2.

OUR FEDERAL CONSTITUTION STANDS IN STARK CONTRAST TO MANY STATE CONSTITUTIONS, WHICH READ MORE LIKE STATUTORY CODES. TO SOME DEGREE, THAT COMES AS NO SURPRISE -- IT'S OFTEN MUCH EASIER TO AMEND A STATE CONSTITUTION THAN IT IS TO AMEND THE FEDERAL CONSTITUTION. IN SOME STATES, FOR EXAMPLE, AMENDMENTS CAN BE EASILY INITIATED AND ARE CONSUMMATED BY SIMPLE MAJORITY VOTES.

THE BOTTOM LINE, HOWEVER, IS THAT -- WHATEVER THE ROLE OF STATE CONSTITUTIONS -- THE FEDERAL CONSTITUTION STANDS AS A UNIQUE, FUNDAMENTAL CHARTER OF INDIVIDUAL RIGHTS AND GOVERNMENTAL POWERS.

IS THERE A RISK THAT THE MORE OFTEN THE FEDERAL CONSTITUTION IS AMENDED, THE LESS FORCE THE DOCUMENT AS A WHOLE WILL HAVE AS OUR BASIC COVENANT OF GUIDING PRINCIPLES?

Response to Question 2:

As contrasted with most state constitutions, the federal Constitution is notable for its relative brevity and comprehensiveness. As Chief Justice Marshall put it so well in McCulloch v. Maryland, the "nature [of a properly drawn constitution] requires, that only its great outlines should be marked, its important objects designated . . ." By way of contrast, as Marshall also observed, a constitution drawn "to contain an accurate detail of all of the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public." This, unhappily, has been the fate of a great many state constitutions. To start down the road of adding amendments to the federal Constitution when there has been no demonstration of a pressing need for constitutional change would run the serious risk of diluting the Constitution and undermining the unique place it holds in our political, legal and moral universe.

QUESTION 3:

COMMENTATORS ON THIS SUBJECT HAVE IDENTIFIED TWO WAYS THAT AN AMENDMENT CAN FIT -- OR NOT FIT -- INTO THE FRAMEWORK OF THE CONSTITUTION.

FIRST, THERE'S THE "SUBSTANTIVE FIT" AND THE QUESTION OF WHETHER A PROPOSED AMENDMENT CAN BE SQUARED WITH CERTAIN UNDERLYING PRINCIPLES OR THEMES THAT ARE EASILY RECOGNIZABLE IN THE CONSTITUTION, SUCH AS SEPARATION OF POWERS; FEDERALISM; EQUALITY; INDIVIDUAL AUTONOMY; AND DUE PROCESS, TO NAME JUST A FEW. THE COMMENTATORS ARGUE THAT ANY PROPOSED AMENDMENT MUST TAKE INTO ACCOUNT THOSE EXISTING, FUNDAMENTAL PRINCIPLES BECAUSE THEY'RE THE FABRIC THAT KEEPS OUR CONSTITUTION CLOTH TOGETHER.

SECOND, THERE'S THE "STRUCTURAL FIT" AND THE QUESTION OF WHETHER A PROPOSED AMENDMENT CAN BE SQUARED WITH THE BROAD STATEMENTS OF PURPOSE AND PRINCIPLE THAT UNDERLIE THE CONSTITUTION. THE CONSTITUTION HAS ENDURED, MANY POINT OUT, BECAUSE IT DOESN'T HAVE THE PROLIXITY OF A LEGAL CODE BUT IS INSTEAD A BROAD AND ENDURING CHARTER OF OUR LIBERTIES.

HOW DOES AN AMENDMENT TO PROTECT THE FLAG FROM ACTS OF DESTRUCTION "FIT" INTO THIS SUBSTANTIVE AND STRUCTURAL FRAMEWORK? DOES IT FIT INTO BOTH, NEITHER, OR ONE AND NOT THE OTHER?

Response to Question 3:

In my judgment, an amendment designed to overturn the decision in Texas v. Johnson would not harmonize with the Constitution either as a matter of "substantive fit" or as a matter of "structural fit." As to the substance of the Constitution, such an amendment would run counter -- and designedly so -- to those principles of free expression which lie at the heart of our constitutional tradition. As to the structure of the Constitution, an amendment addressed to so limited an issue would be at odds with the broad architectural sweep of the Constitution.

QUESTION 4:

MUCH OF OUR DISCUSSION ABOUT THE PRESIDENT'S PROPOSED CONSTITUTIONAL AMENDMENT HAS FOCUSED ON THE IMPACT SUCH AN AMENDMENT WOULD HAVE ON THE CONSTITUTION AND THE BILL OF RIGHTS. IT'S OBVIOUSLY IMPORTANT TO ASSESS THOSE QUESTIONS, AND YESTERDAY'S HEARING IS CERTAINLY PART OF OUR EFFORT TO DO JUST THAT.

BUT ONE ISSUE THAT MAY GET LOST IS THE IMPACT OF THE AMENDMENT ON THE SUPREME COURT AND ITS DECISION-MAKING IN THE FIRST AMENDMENT AREA.

IF YOU LOOK AT THE POST-CIVIL WAR SUPREME COURT, THERE'S REALLY BEEN ONLY ONE ABSOLUTELY CLEAR CASE WHEN ONE OF ITS DECISIONS WAS REVERSED BY CONSTITUTIONAL AMENDMENT -- THAT WAS THE 16TH AMENDMENT, WHICH OVERRULED A CASE HOLDING THAT THE FEDERAL INCOME TAX WAS UNCONSTITUTIONAL. AFTER THAT REBUKE, THE COURT REALLY LET THE GOVERNMENT DO WHAT IT WANTED TO WITH RESPECT

TO TAXES -- FOR EXAMPLE, THE COURT REJECTED CLAIMS THAT THE RATES WERE DISCRIMINATORY AND CLAIMS THAT CERTAIN ASSETS DIDN'T QUALIFY AS INCOME FOR TAX PURPOSES.

HOW WOULD YOU ASSESS THE LIKELY IMPACT ON THIS SUPREME COURT OF AN AMENDMENT OVERRULING TEXAS V. JOHNSON, WHICH IS EXACTLY WHAT THE PROPONENTS OF THIS AMENDMENT CLAIM IT WOULD DO?

Response to Question 4:

It is of course possible that this Supreme Court would read an amendment overruling Texas v. Johnson narrowly -- i.e., as having implication for the particular problem of flag-destruction and for no other problem. However, it seems to me rather more likely that the Court would tend to read the amendment more broadly, understanding it as a generalized admonition to the Justices to be less vigilant in protecting values of free expression.

QUESTION 5:

WHAT RISK IS THERE THAT THE PRESIDENT'S PROPOSED AMENDMENT MIGHT LEAD THE COURT TO STEP BACK FROM SOME OF THE PROTECTION IT HAS TRADITIONALLY AFFORDED TO SYMBOLIC CONDUCT OR TO FREE SPEECH GENERALLY?

Response to Question 5:

As I have suggested in response to the foregoing question, there seems to me a real possibility that adoption of the proposed amendment to overrule Texas v. Johnson would dampen the Court's historic resolve to protect first amendment values in their fullest scope. And for the Court to retreat from its historic commitment to freedom of expression could have calamitous -- perhaps even catastrophic -- consequences.

United States District Court
For The Eastern District of Pennsylvania

Chambers of
Louis H. Pollak
United States District Judge

16613 United States Courthouse
Independence Mall West
Philadelphia, Pa. 19106-1723
215 597-9590

August 23, 1989

Senator Arlen Specter
331 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

It has occurred to me that in at least one important respect I did not fully respond to a question you put to me at the August 21, 1989, Senate Judiciary Committee hearing at which Senator Biden and you explored the question whether Congress should undertake, either by statute or by constitutional amendment, to overturn the Supreme Court's decision in Texas v. Johnson.

You asked, in substance, what standards were applicable to the question whether legislation was called for. In responding, I think I did not adequately make the point that as a general matter Congress should not enact a statute unless it finds that there is a significant problem that calls for federal intervention. In the flag-destruction context, I submit that the record falls short of supporting such a finding. I do not know of any general pattern of flag-destruction. To the extent that there have been or may be other isolated instances of the aberrant and abhorrent behavior engaged in by Gregory Lee Johnson, local police are fully empowered to handle those instances that demonstrably threaten breaches of the peace, as the prevailing opinions in both the Texas Court of Criminal Appeals and the Supreme Court made plain.

Indeed, Gregory Johnson's behavior, which took place in 1984, excited no general outcry -- or even any general interest or awareness -- until the Supreme Court, on June 21, 1989, sustained the Texas appellate court's determination that Johnson's conviction could not be sustained. What this means, I suggest, is that the significant problem, if any, is not that Gregory Lee Johnson burned a flag but rather that a great many people, understandably distressed at flag-burning, find the Supreme Court's decision difficult to comprehend. But I respectfully urge you to consider that difficulty in comprehending a Supreme Court ruling is not a cognizable ground for overturning it -- most especially when the ruling is one of constitutional dimension, which touches on our most cherished liberties. What is called for under such circumstances is more public discussion of the principles of free speech, not legislation.

I am taking the liberty of sending a copy of this letter to Senator Biden.

Sincerely,

Louis H. Pollak

cc: Senator Joseph R. Biden, Jr.

The CHAIRMAN. Our next panel have come some considerable distance to testify, and while they are being called forward, I am told that the media would like very much to be able to change their mikes to that table, and this would be the appropriate time to do it if you are going to do it.

[Pause.]

The CHAIRMAN. Our next witnesses are very distinguished in the field of constitutional history. The first member of the panel is Stanley Kutler, who is the E. Gordon Fox Professor of American Institutes and professor of law at the University of Wisconsin. The professor has written extensively in the field of American constitutional history.

The second panel member is Michael Parrish, professor of history at the University of California at San Diego, probably the most liveable and beautiful city in America, at least its weather. Among Professor Parrish's works is a two-volume biography of Justice Felix Frankfurter.

Gentlemen, welcome. We appreciate the long trip that both of you have made here to Philadelphia, and I am sincere when I say that. I know this is in the middle of your vacation period as well as the rest of America's, and the fact that you would take the time in one case to travel all the way across the Nation and in the other case to travel almost two-thirds of the way is much appreciated by this committee.

In the interest of time and the ability to have some exchange of views on this subject, if you could each limit your statements to in the area of 15 minutes or less, we would appreciate it very much.

With that, why don't we begin. Have you gentlemen worked the order in which you'd like to proceed?

Professor PARRISH. We flipped a coin at the hotel this morning, Mr. Chairman.

The CHAIRMAN. All right. Professor Parrish, you go ahead.

PANEL CONSISTING OF MICHAEL PARRISH, PROFESSOR OF HISTORY, UNIVERSITY OF CALIFORNIA; SAN DIEGO, CA; AND STANLEY I. KUTLER, E. GORDON FOX PROFESSOR OF AMERICAN INSTITUTIONS, AND PROFESSOR OF LAW, UNIVERSITY OF WISCONSIN, MADISON, WI

STATEMENT OF PROFESSOR PARRISH

Professor PARRISH. Thank you very much, Mr. Chairman, Senator Specter. I am honored to be here this morning to discuss with you the history of amending the Constitution of the United States, and specifically how the flag desecration amendment proposed by the Bush Administration relates to that history.

At the threshold, let me say that I regard the proposed measure as contrary to our amendment tradition. In my judgment, it is a grave menace to the fundamental spirit of that tradition which has been dedicated to expanding the scope of individual freedom and liberty, not contracting it through Government regulation.

I must say I think my views are shared by a great many people in this country upon sober reflection. I traveled here yesterday through Dallas-Fort Worth, and I sat next to a young woman from the Texas area. When I mentioned to her what my business was in

Philadelphia for the next day, she was quite frankly astonished and somewhat dismayed that the Congress of the United States would be spending so much time on this issue. She said to me as I was departing the plane, "Would you tell the Senators that I think the greatest desecration to the American flag is when I go to my local drugstore or my K-Mart and I buy a flag which says 'made in South Korea' or 'made in Taiwan' ", that it is very hard to find an American flag manufactured in this country and that they should pay more attention to matters of the deficit, productivity, and drug abuse. That, from a young lady from Texas, from the Dallas area, who was in fact rather knowledgeable about the case of *Texas* v. *Johnson*.

In the 200 years under the Constitution, literally thousands of amendments ranging from the sublime to the ridiculous have been proposed in Congress. The vast majority have seldom come to a vote in either chamber. Proposals have been offered to provide uniform marriage and divorce laws throughout the United States, to change the method of electing the President, to prohibit polygamy, and even to change the method of amending the Constitution itself.

In 1810, as Judge Pollak noted, efforts were made through constitutional amendment to strip Americans of their citizenship if they claimed titles of nobility or kept any gift from a foreign government or foreign potentate. In the 1820's and 1830's, several proposals would have constitutionally abolished the practice of dueling. Others have wanted to limit the terms of soldiers' enlistments, abolish the presidential veto, restrict the proposing of amendments to every tenth year, guarantee what an amendment called the "literal construction of the Constitution", provide for an export tax on cotton, let the people elect postmasters, acknowledge the Deity in the Constitution, and one even to change the name of the country to the United States of the World.

Fortunately, Congress has not seen fit to send most of these amendments forward to the States for ratification. Among those passed by Congress and later failing of ratification, two stand out in our recent history—the Child Labor Amendment of the interwar period and the Equal Rights Amendment. But they, like the vast majority of the 26 amendments actually adopted, attempted to empower individuals against the encroachments of government or to tear down the barriers of race, gender, and class discrimination that historically prevented many Americans from securing the blessings of liberty and justice.

If our Constitution has a fundamental bias, it seems to me it is the bias of liberty, the presumption of freedom, the desire to limit the scope of government. These libertarian assumptions inform virtually all of the great amendments adopted since 1790.

I need not remind you of the first ten, the Bill of Rights. They, it seems to me, are the clearest expression of this grand tradition. They prohibit Government from abridging speech and press; protect the right to bear arms; the right to be secure against unreasonable searches and seizures; the right to due process of law and just compensation if private property is taken; the right to a speedy and public trial; the right not to be subjected to cruel and unusual punishments.

Of the remaining amendments, by far the largest number secure additional private rights against State encroachment and/or expand the sphere of democratic decisionmaking: The abolition of slavery; the guarantee of equal protection; securing The right to vote against racial, gender, economic or age discrimination; providing for the direct election of members of the Senate; and enfranchising the citizens of the District of Columbia.

Three of the four amendments adopted specifically to overturn Supreme Court decisions—the 14th amendment's guarantee of citizenship; the income tax provision of the 16th amendment, and the enfranchising of 18 year-olds—did so for libertarian and egalitarian reasons: To guarantee all persons to the Federal courts, to apportion support of the Government on the basis of ability to pay, and to ensure that those called to defend the country would have some voice in the making of its foreign policy.

Moreover, Congress and the States had every justification to reverse Supreme Court decisions on several of these occasions because the Justices had strayed very far from accepted canons of constitutional interpretation and precedent.

On questions of law and fact, the *Dred Scott* decisions was one of the least defensible in the Court's history. Its limited definition of citizens stripped not only black persons, free as well as slave, of their rights, but excluded even women and children from coverage as well.

In the notorious *Income Tax* cases, the Justices flatly ignored 100 years of their own precedent when striking down an act of Congress.

Comparisons with the present controversy over *Johnson* v. *Texas* could not be more striking. One may not like the majority opinion but it is, as Judge Pollak reminded us this morning, squarely within the tradition of first amendment jurisprudence and firmly anchored in past precedents by the Court.

Only two amendments, the 18th and the 22d, expanded dramatically what I would call the coercive powers of government or otherwise limited democratic decisionmaking. Neither the 18th amendment nor the 22d are looked upon with great affection, even by conservatives, and one was repealed within a decade.

The balance of the amendments, Nos. 11, 12, 20, and 25, are wholly procedural or technical in nature.

The proposed flag desecration amendment offered by the Bush Administration flies squarely in the face of this libertarian-egalitarian tradition of constitutional amendments. It does not secure or enhance individual freedom; it seems to restrict it. It does not limit governmental authority; on the contrary, it unleashes it. It does not promote equality or justice; it invites Congress and the State legislatures to punish those forms of expression and conduct which offend the sentiments of the majority. This, the first amendment forbids.

As Mr. Justice Jackson observed in the *Flag Salute* case that Judge Pollak quoted to you earlier:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's life to life, liberty and property, to free speech, a free press, freedom of wor-

> ship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. If there is any fixed start in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Those are the words of Justice Jackson and the majority in the *Barnette* case during the middle of the Second World War.

The proposed amendment would, for the first time in my opinion, actually limit judicial construction of the first amendment, thereby dealing a serious blow both to freedom of speech and to the independence of the judiciary, one of our most treasured constitutional concepts, the one in fact that sharply distinguishes our form of government from all others. Worse yet, the amendment would in my view give constitutional sanction for the first time to suppression by government of expression, thereby permitting the reintroduction of the crimes of seditious libel or civil blasphemy into American law.

The first amendment was intended to prohibit these offenses in 1790 because they were regarded as contrary to the first principles of republicanism and democracy. In a system of government like ours, where the people are the ultimate sovereign, where officials govern by the consent of the governed, the punishment of people who show contempt for that government or for those officials is an utter and complete contradiction. So believed James Madison and others who wrote the first amendment.

Our momentary outrage over a few incidents of flag burning should not lead us down a path fraught with so much constitutional danger, a path so at odds with the historic traditions of our amending process. Similar anger greeted the Supreme Court's rulings in the 1960's on reapportionment and school prayers. A blizzard of amendments came forth in Congress, but cooler heads finally prevailed. The amendments were put aside once Members of Congress and the public understood what the Court had actually done in those cases. Once again, the Justice had expanded the boundaries of American freedom and equality, seeking thereby to fulfill the Constitution's mission of a more perfect union.

I hope cooler heads will prevail in the days ahead and that you will heed the very wise counsel of Mr. Justice Holmes, who spoke at a time after World War I of far greater danger to the Nation. This is what he said in his famous dissent in the case of *Abrams* v. *United States*:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to

> check the expression of opinions that we loath and believe fraught with death unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

To save the country. Those were Justice Holmes' words. And thank God we are not even close today to a situation, it seems to me, that would justify such radical surgery on the first amendment or the independence of the judiciary as is contained in the flag desecration amendment offered by the Bush administration.

Thank you, and I yield to my distinguished colleague from Wisconsin.

The CHAIRMAN. Thank you very much for your statement.

[The written statement of Professor Parrish follows:]

STATEMENT OF PROFESSOR MICHAEL E. PARRISH
BEFORE SENATE JUDICIARY COMMITTEE

Philadelphia, August 14, 1989

Mr. Chairman, Senator Spector, I am honored to be here this morning to discuss with you the history of amending the Constitution of the United States and more specifically, how the Flag Desecration Amendment, proposed by the Bush Administration, relates to that history. At the threshold, let me say that I regard the proposed measure as contrary to our amendment tradition. In my judgment, it is a menace to the fundamental spirit of that tradition which has focused on expanding the scope of individual freedom and liberty, not contracting it through government coercion.

I am not alone in questioning the necessity for this Congressional effort. Traveling here yesterday by plane, I sat next to a young woman from Dallas, Texas. When I told her about the purpose of my visit to Philadelphia and about these hearings, she expressed dismay that the Congress would spend its valuable time on such an issue. As we were about to leave the aircraft, she said to me: "The greatest desecration of the American flag is when I go to my local drugstore to buy one and find they are all made in South Korea or Taiwan. I don't think we manufacture them here anyone. Tell the Senators we should be concerned more with trade deficits, productivity, and drug abuse." I report her views to you, because I think they represent substantial public sentiment.

In 200 years under the Constitution, literally thousands of amendments, ranging from the sublime to the ridiculous, have been proposed in Congress. The vast majority have seldom come to a vote in either chamber. Proposals have been offered to provide uniform marriage and divorce laws throughout the United States, to change the method of electing the President, to prohibit polygamy, and even to change the method of amending the Constitution itself.

In 1810 a serious effort was undertaken through Constitutional amendment to strip Americans of their citizenship if they claimed or accepted titles of nobility or kept any gift from a foreign government. In the 1820s and 30s, several proposals would have constitutionally abolished the practice of dueling. Others have wanted to limit the term of soldiers' enlistments, abolish the presidential veto, restrict the proposing of amendments to every tenth year, guarantee the "literal construction of the Constitution," provide for an export tax on cotton, let the people elect postmasters, acknowledge the Deity in the Constitution, and change the name of the country to the "United States of the World."

Fortunately, Congress has not seen fit to send these forward to the states for ratification. Among those passed by Congress and later failing of ratification, two stand out in our recent history: the Child Labor Amendment of the inter-war period and the Equal Rights Amendment. They, like the vast majority of the 26 amendments actually adopted, sought to empower individuals against the encroachments of government and to tear down the barriers of race, gender, and class discrimination that historically prevented many Americans from securing the blessings of liberty and justice. If our Constitution has a fundamental bias it is the bias of liberty, the presumption of freedom, the desire to limit the scope of government. This libertarian assumption informs virtually all of the great amendments adopted since 1790.

I need not remind anyone here that the first ten amendments, the Bill of Rights, are the clearest expression of this grand tradition. They prohibit government from abridging speech and press; protect the right to bear arms; the right to be secure against unreasonable searches and seizures; the right to due process of law and just compensation if private property is taken; the right to a speedy and public trial; and the right not to be subjected to cruel and unusual punishments.

Of the remaining amendments, by far the largest number secure additional private rights against state encroachment and/or expand the sphere of democratic decision-making: the abolition of slavery; the guarantee of equal protection of the laws; securing the right to vote against racial, gender, economic, or age discrimination; providing for the direct election of United States Senator; enfranchising citizens of the

District of Columbia.

Three of the four amendments adopted specifically to overturn Supreme Court decisions -- the Fourteenth Amendment's citizenship guarantee, the income tax provision of the Sixteenth Amendment, and the enfranchisement of eighteen year olds -- did so for libertarian and egalitarian reasons: to guarantee all persons access to the federal courts; to apportion support of the government on the basis of ability to pay; and to insure that those called to fight for the nation had some voice in the shaping of its foreign policy. Moreover, Congress and the states had every justification to reverse the Supreme Court on two of these occasions, because the justices had strayed far from accepted canons of constitutional interpretation and precedent. On questions of law and fact, the Dred Scott decision was one of the least defensible in the Court's history. Its definition of citizenship stripped not only Black persons (free as well as slave) of their rights, but excluded women and children from coverage too. In the notorious Income Tax cases, the justices flatly ignored almost 100 years of their own precedents when striking down an act of Congress. Comparisons with the present controversy over Johnson v. Texas could not be more striking. One may not like the majority opinion, but it is squarely within the tradition of First Amendment jurisprudence and firmly anchored in precedent.

Only two amendments, the Eighteenth and the Twenty-Second, expanded dramatically the coercive powers of government or otherwise limited democratic decision-making. Neither is looked upon with great favor, even by conservatives, and one was repealed within a decade. The balance of the amendments (11, 12, 20, and 25) are wholly procedural or technical.

The proposed Flag Desecration Amendment offered by the Bush Administration flies squarely in the face of the libertarian-egalitarian tradition of constitutional amendments in this country. It does not secure or enhance individual freedom; it seeks to restrict it. It does not limit governmental authority; on the contrary it unleashes it. It does not promote equality or justice; it invites Congress and the state legislatures to punish those forms of expression and conduct which offend the sentiments of the majority. This, the First Amendment forbids. As Mr. Justice Jackson observed in the Flag Salute case of 1943:

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. . . . If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

The proposed amendment would, for the first time, actually limit judicial construction of the First Amendment, thereby dealing a serious blow to the independence of the judiciary and to one of our most treasured Constitutional provisions, the one, in fact, that sharply distinguishes our form of government from all others. Worse yet, the amendment would give constitutional sanction for the first time to suppression by government of expression, thereby permitting the reintroduction of the crime of seditious libel or civil blasphemy into American law. The First Amendment was intended to prohibit these offenses in 1790 because they were regarded as contrary to the first principles of republicanism and democracy. In a system of government like ours, where the people are the ultimate sovereign, where officials govern only by the consent of the governed, the punishment of people who show contempt for that government or its symbols is an utter contradiction. So believed those like James Madison, who wrote the First Amendment.

Our momentary outrage over a few incidents of flag burning should not lead us down a path fraught with so much constitutional danger, a path so at odds with the historic traditions of our amending process. Similar anger greeted the court's rulings on apportionment and school prayers. A blizzard of amendments came forth in Congress, but cooler heads finally prevailed. The amendments were put aside once members of

Congress and the public understood what the Court had actually done in those cases. Once again, the justices had expanded the boundaries of freedom and equality, seeking to fulfill the Constitution's mission of "a more perfect Union." I hope cooler heads will prevail in the days ahead and that you will heed the wise counsel of Mr. Justice Holmes, spoken at a time of far greater danger to the nation:

"Persecution for the expression of opinion seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loath and believe fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

Thank God, we are not even close today to a situation that would justify the radical surgery on the First Amendment and the independence of the judiciary contained in the proposed Flag Desecration Amendment.

STATEMENT OF PROF. STANLEY I. KUTLER

Professor **Kutler**. Mr. Chairman, I am honored to be here today. I understand that I have been invited to speak in my capacity as a historian, specifically as a historian of American constitutional and legal development.

I am not here to advocate particular theories of the first amendment or testify to the merits and wisdom of the Biden-Roth-Cohen Flag Protection Bill. Others are much more qualified than I to speak on these matters. Nor do I need be here to testify to my love of the flag.

Instead, I wish to offer some thoughts on our respect for the Constitution and what that document represents for this society.

The issue you confront, it seems to me, is whether it is wise and necessary to respond to an isolated flag burning incident in Texas and a very limited Supreme Court opinion with the awesome weight of a constitutional amendment. I think not. Such an action would trivialize the great principles and injunctions of the Constitution. It would furthermore be directly contrary to the history of the amending process.

The flag is indeed, as others have testified, an important symbol. It is, though, an emotional one that often obscures and overshadows the rational appeal of the Constitution itself. Is the Supreme Court's decision in *Texas* v. *Johnson* such that it is necessary to us to set forth a new constitutional amendment?

Alas, since the Court ruled 2 months ago, the Republic stands, and the flag flies. Meanwhile, you must consider the proposed amendment. But the response, I believe, is disproportionate to the situation. Unfortunately, passage of such an amendment would not be the first time that emotion ruled and presented the Nation with a constitutional amendment hastily passed and which tampered with freedom.

I hope you would agree, however, that the 18th amendment prohibiting alcoholic beverages is not a model success story in our legal and constitutional history for you to emulate.

Let me briefly comment on one of the points that Judge Bork made which addresses itself specifically to the problem you have raised, Senator Biden.

Judge Bork brusquely dismissed any consideration of a statutory response to *Texas* v. *Johnson*. He said that if *Marbury* v. *Madison* means anything, you just cannot do this. Well, history tells us otherwise. First of all, Andrew Jackson had something quite different to say than John Marshall on the bank. In 1938, Congress ignored two Supreme Court decisions invalidating Federal child labor legislation and passed a new bill, one almost exactly the same in language as the Court had rejected 20 years earlier, and the 1938 law was upheld.

Historically, the most famous example involves *Dred Scott*, but not in the way it has been mentioned. We all know that the 14th amendment rectified the Dred Scott decision's definition of citizenship. What is often overlooked is that in 1862, Congress directly assaulted the *Dred Scott* decision by saying that neither slavery nor involuntary servitude shall exist in the territories of the United States.

Now, the Congress could not have been more emphatic in its action than what it did then.

Incidentally, I would hasten to point out that when Congress acted in 1862 and again in 1838, mercifully Congress spared us any judiciary-bashing. There is only one reference in that 1862 legislation to Chief Justice Taney. It was done on a very, very high level. When Congress wished to abolish slavery nationwide, then it resorted to the amendatory process, which it had to do, in the form of the 13th amendment.

I am not suggesting, of course, that you completely repudiate the Court's ruling with a statutory challenge—specifically, I do not wish to magnify this incident in Texas and thereby equate flag burning with issues so significant as slavery or child labor, ones that indeed required a massive congressional challenge at the time.

Now, the history of congressional consideration of constitutional amendments is a lengthy one, most notable for incorporating truly substantive guarantees and changes, such as those in the first 10 amendments and the Reconstruction amendments. Some amendments have been purely mechanical in scope.

But interestingly, the history of the amending process is also one of what does not happen, as Congress has rejected thousands of proposed amendments in the past 200 years—wisely so, I am sure we would almost all agree. The abortive amendments generally have been introduced largely to appeal to momentary political passions or to address a specific constituency.

The paucity of amendments actually passed and ratified eloquently testifies to what James Madison called the second sense of the community. The failure of so many proposed amendments also reveals the politicization of the amending process, and a politicization that is essentially symbolic in nature.

I suppose that this leads to a response to Senator Specter's question about responding to political wishes of constituents. I think if we go back to just a few years ago and we look at what happened with Senator Goldwater and the prayer amendment, that that might offer some comfort and also some instruction. Senator Goldwater's actions on the prayer business I think illustrate both the process of what we call symbolic politics and offer a lesson in constitutional responsibility.

As a Presidential candidate in 1964, Senator Goldwater freely criticized the Supreme Court for its decision in *Engel* v. *Vitale*. But 20 years later, when President Reagan prepared for the 1984 election and supported a constitutional amendment to override the Court's decision, Senator Goldwater retreated to the Constitution and to an understanding of the historical reasons for the first amendment's religion clauses and voted against that amendment.

In 1984, Senator Goldwater and others opposed tampering with the Constitution. He knew, as did others, that the freedom to pray still existed. He simply would not open the door for State intervention in any way—precisely as James Madison and his evangelical constituents of the 1790's intended. The prayer controversy I think offers some interesting parallels to the present issue.

The Constitution is, as John Marshall said in a variety of ways, intended to endure for ages to come. It was also intended to survive fads or emotions. The exceptions to that maxim unfortunately prove the rule; witness again the embarrassment of prohibition.

Abraham Lincoln talked about appealing to the "better angels of our nature." Much of that nature, I believe, is embodied in the Constitution's emphasis on the liberty and security of the individual free from governmental restraint. That was the high-minded purpose of the framers of the Constitution and the Bill of Rights. The proposed amendment, however, stands in contrast to that purpose. These hearings and your deliberative process offer an opportunity to invoke Madison's sober second sense of the community.

The proposed amendment I suspect will be of little practical consequence in itself. It could be right, it could be wrong. Neither the Republic nor the heavens will fall if it were passed. But it is a dangerous practice, I think, to resort so cavalierly, so blithely to an amendment, a feature that the framers of the Constitution took so seriously. Certainly, nothing in the events of the past 2 months justify such a response.

[Prepared statement of Prof. Stanley I. Kutler follows:]

STATEMENT OF STANLEY I. KUTLER*
BEFORE THE SENATE JUDICIARY COMMITTEE
REGARDING STATUTORY AND CONSTITUTIONAL RESPONSES
TO THE SUPREME COURT DECISION IN TEXAS v. JOHNSON

August 14, 1989

Mr. Chairman, I am honored to be here today. I understand that I have been invited to speak in my capacity as a historian, specifically as a historian of American constitutional and legal development. I am not here to advocate particular theories of the First Amendment, or analyze the merits of the Biden-Roth-Cohen Flag Protection Bill; others are much better qualified than I to speak on those topics. Instead, I wish to offer some thoughts on the history of the amending process, our respect for the Constitution, and what that document represents for this society.

The issue you confront, it seems to me, is whether it is wise and necessary to respond to an isolated flag-burning incident in Texas and a very limited Supreme Court opinion with the awesome weight of a constitutional amendment. I think not. Such an action would trivialize the great principles and injunctions of the Constitution. It would, moreover, be directly contrary to the history of the amending process.

The flag is indeed, as others have testified, an important symbol of our nation; it is, though, an emotional one that often obscures and overshadows the rational appeal of the Constitution itself. Is the Supreme Court's decision in Texas v. Johnson such that it is necessary for us to set forth a new constitutional commandment: "That Congress and the States shall have power to prohibit the physical desecration of the Flag of the United States?"

Alas! since the Court ruled two months ago, the Republic stands and the flag flies. Meanwhile, you must consider the proposed constitutional amendment. But the response is disproportionate to the situation. Unfortunately, passage of such an amendment would not be the first time that emotion ruled and presented the nation with a constitutional amendment, hastily-passed and which tampered with freedom. I hope you would agree, however, that the Eighteenth Amendment prohibiting alcoholic beverages is not a model success story in our legal and constitutional history for you to emulate.

The Articles of Confederation, our first constitution, required unanimity among the states to ratify a constitutional amendment. The process was cumbersome, seemingly impossible, and certainly inadequate. The framers of the new constitution in 1787 established a system for amendments that would, as James Madison wrote in Federalist 43, guard "equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults." And that principle largely sums up the history of our constitutional amendments, a history that reflects caution and careful consideration for the adoption of amendments.

On four occasions, Congress has found it necessary to override Supreme Court decisions with a constitutional amendment. But the history is a mixed one. The Eleventh Amendment, hastily proposed and ratified in the wake of Chisholm v. Georgia (1793), has been, by common consent, relatively meaningless. The first sentence of the Fourteenth Amendment rectified one of the few significant omissions of the Constitution and provided a definition of citizenship that repudiated the racist ruling in the Dred Scott Case (1857). The Sixteenth Amendment reversed the Court's invalidation of the income tax in the Pollock case (1895), but the decision truly was an aberration as the Court previously had upheld income taxes. The evidence is quite compelling that the constitutional amendment was designed largely to save the Supreme Court from embarrassment. Finally, the Court itself in Oregon v. Mitchell (1971) signalled the need for a constitutional amendment to lower the national voting age to eighteen, and Congress and the states complied with the Twenty-sixth Amendment.

The Fourteenth, the Sixteenth, and the Twenty-sixth Amendments, I am sure we would agree, represent significant issues -- citizenship, income tax, and voting rights. Flag-burning pales by comparison.

Judge Robert Bork in his testimony brusquely dismissed any consideration of a statutory response to Texas v. Johnson. He testified that if John Marshall's 1803 opinion in Marbury v. Madison means anything, you cannot overturn a Supreme Court decision with a statute. But we have numerous examples where the President or Congress directly repudiated, or sidestepped, Supreme Court decisions. Andrew Jackson ignored John Marshall's famous decision in McCulloch v. Maryland (1819), vetoed a new bank bill, and Congress sustained Jackson's veto. In 1938, Congress ignored two Supreme Court decisions invalidating federal child labor legislation and passed a new bill, one almost exactly the same in language as the Court had rejected twenty years earlier. And the 1938 law was upheld.

Historically, the most famous example involves the Dred Scott decision in 1857. The Supreme Court had ruled that Congress could not prohibit slavery in the territories. But with a simple statute in 1862, Congress declared the territories forever free of slavery. That law embodied the philosophy of the Republican Party since it had been formed eight years earlier. Congress, incidentally, acted with a near-total absence of judiciary-bashing in 1862, and again in 1938. When Congress wished to abolish slavery nationwide, including in those states where it had been lawful, then it necessarily resorted to the amending process to give us the Thirteenth Amendment.

I am not suggesting that you completely repudiate the Court's ruling with a statutory challenge. Professor Lawrence Tribe has offered a compelling argument that a statute can be written to simply cure the defect of existing law as stipulated by the Court. More to the point, I do not wish to magnify this incident in Texas and thereby equate flag-burning with issues so significant as slavery or child labor that required a forthright, direct congressional challenge.

The history of congressional consideration of constitutional amendments is a lengthy one, most notable for incorporating truly substantive guarantees and changes, such as those in the first ten amendments and the Reconstruction Amendments of the 13th, 14th, and 15th. Other amendments have been purely mechanical, such as changing the date of the presidential inauguration or altering other institutional arrangements.

But interestingly, the history of the amending process is also one of what does not happen as Congress has rejected thousands of proposed amendments in the past two hundred years. Wisely so, I am sure. The abortive amendments generally have been introduced largely to appeal to momentary political passions, or to address a specific constituency. The paucity of amendments actually passed and ratified eloquently testifies to what James Madison called the "second sense of the community." The failure of so many proposed amendments also reveals the politicization of the amending process, and a politicization essentially symbolic in nature.

Symbolic politics serves a passive type of leadership that carefully avoids tough decisions "while at the same time posturing as a protagonist against an evanescent enemy," political scientist Murray Edelman has written. While avoiding or deflecting real issues, political leaders "maintain 'symbolic leadership' through . . . publicized action on controversial policies or on trivia . . . ." Image is crucial and important, particularly to maintain faith in morally complete leaders, untainted by any deviation from conventional and traditional morality. Such an image is difficult to contest. But it does not take us very far -- except maybe to divert attention from more pressing, more intractable issues. In 1972, Richard Nixon told his aides that the election was about patriotism, not taxes and inflation.

Senator Barry Goldwater's response to the Supreme Court's prayer decision in Engel v. Vitale in 1962 illustrated both the process of symbolic politics, and offered a lesson in constitutional responsibility. As a presidential candidate in 1964, Senator Goldwater had freely criticized the Court for its decision. But twenty years later, as President Reagan prepared for the 1984 election and supported a constitutional amendment to override the Court's decision, Senator Goldwater retreated to the Constitution and to an understanding of the historical reasons for the First Amendment's religion clauses, and voted against the proposed amendment.

In 1984, Senator Goldwater and others opposed tampering with the Constitution. They knew that the freedom to pray still existed; they simply would not open the door for state intervention in any way -- precisely as James Madison and his evangelical constituents of the 1790s intended. The prayer controversy offers some parallels to the present issue.

The Constitution is more than a momentary thing; it is intended to endure for ages to come, as Marshall told us in different ways. It also was intended to survive fads or emotions; the exceptions to that maxim unfortunately prove the rule: witness again the embarrassment of prohibition.

Justice Oliver Wendell Holmes once wrote, in a memorable statement on our guarantees of liberty, that the Constitution is an experiment and we always wager our salvation upon imperfect knowledge. We have done quite well for two centuries without introducing amendments that would detract from, or even demean, the original purposes of the Constitution, including the Bill of Rights which sought to secure the liberty -- particularly, the political liberty -- of the individual against governmental intrusion.

Abraham Lincoln talked about appealing to the "better angels of our nature." Much of that nature is embodied in the

Constitution's emphasis on the liberty and security of the individual, free from governmental restraint. That was the high-minded purpose of the framers of the Constitution and the Bill of Rights; the proposed amendment, however, stands in contrast to that purpose. These hearings and your deliberative process, offer an opportunity to invoke Madison's sober second sense of the community. The proposed amendment will be of little practical consequence in itself. Neither the Republic nor the heavens will fall if it were passed. But it is a dangerous practice to resort so cavalierly, so blithely, to an amendment, a feature that the framers took so seriously. Nothing in the events of the past two months justifies such a response.

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The **Chairman**. Gentlemen, I have heard a lot of testimony in the last month, and I must say that both of your testimonies have been direct, cogent, and instructive. It is presumptuous of me to say it, but I am impressed with it, and I have learned quite a bit here this morning.

Let me try to pursue a couple points, if I may, but let me make a comment first. It should be noted for the record and the press and the constituents who are here that this is not the first time the U.S. Congress has dealt with the issue of amending the Constitution for the purpose of making flag desecration unlawful. In the midst of the Vietnam War, shortly after the Cambodian incursion as it is so euphemistically referred to—I kind of thought it was an invasion, but the incursion into Cambodia—the Senator from Alaska, representing one of the only two States which do not have a law against flag burning, introduced a constitutional amendment, and that constitutional amendment was introduced on August 28, 1970. The operative section of the amendment is:

> Notwithstanding any other provision of this Constitution, the Congress shall have the power by appropriate legislation to regulate the display and handling of the flag of the United States and to protect it from desecration.

Now, as has been pointed out in another context by a distinguished jurist who testified earlier, Judge Pollak, it was on Flag Day in the middle of a war when the Supreme Court handed down a decision that would have in that moment in time and context be viewed as having been somewhat dangerous to hand down.

And here, I want the record to note that this is the second time to my knowledge that the U.S. Senate has contemplated amending of the Constitution of the United States with respect to the flag—and by the way, in this case it was in response to another Supreme Court decision relating to the flag. At that moment, in that time, although there was some public furor, the Senate—I don't know about the House—but the Senate did not even conclude that it warranted holding hearings in the Judiciary Committee.

So, I just want the record to note this is not the first time an amendment has been proposed in response to a constitutional decision relating to the flag and attempting to proscribe its desecration, which is something which is yet to be defined. I assume you have to have something capable of being consecrated before you can desecrate, but I am not sure of that, either.

At any rate, the point is that the purpose of these hearings is to, on sober reflection, make a judgment as to whether or no we should move forward as Judge Pollak said to pass a statute, propose a constitutional amendment, or do nothing.

Now, Professor Parrish, on page 5 of your testimony you state that:

> Worse yet, the amendment would give constitutional sanction for the first time to suppression by government of expression, thereby permitting the reintroduction of the crime of seditious libel or civil blasphemy into American law.

I want that statement clarified. Are you suggesting that this would set a precedent for the reintroduction of the notion of seditious libel and civil blasphemy, or are you suggesting that the amendment in and of itself as proposed by the President would make seditious libel and civil blasphemy unlawful and criminal offenses under American law?

Professor **Parrish**. My point, Senator, was, I believe, the amendment would open the door to that possibility since, as you pointed out earlier in the hearing today, it would in effect give to Congress and to the States the power to define what would be contumacious behavior with respect to the flag. One jurisdiction might hold, as you point out, this would include physical burning; another might conclude it, for example, included flying the flag upside-down or otherwise displaying it in a contumacious manner. And it seems to me that that would reopen the door to in effect charging people with the crime of, in effect, libeling the government or a symbol of the government. And once we go down that path, it seems to me——

The **Chairman**. Can you give me an example? Could you illustrate how a State legislature could pass a law that would be the equivalent of seditious libel or civil blasphemy—under the rubric of the new 27th amendment?

Professor **Parrish**. Well, I would assume that a statute similar to the Texas state of *Texas* v. *Johnson* would be permitted under this provision and therefore——

The **Chairman**. That's the expressed purpose of the administration, then.

Professor **Parrish**. Yes; and I regard that as a statute, as the majority opinion said in that case, as in effect holding that if certain individuals find the behavior or the expression to be contemptuous of the flag, that person may be then subject to criminal punishment. That to me is a form of seditious libel. It in effect says that we have certain persons or symbols of the Government which may not be subject to contempt or ridicule, and anyone who does hold them in contempt or ridicule may be punished by the criminal law. It seems to me that's a very dangerous road to go down.

The **Chairman**. Can you—and I am not playing the bogeyman in this discussion, because as I said at the outset, I will not belabor the point at this moment, but I think it is possible to draft an amendment that does not do the damage you suggest—but I will not argue that point with you at the moment. I'd like to focus on the statute that is before us and the one that we must report back to the U.S. Senate under an agreement made on the floor of the U.S. Senate by a date certain in October; we must report it back either favorably or unfavorably, but we must report this particular amendment back with a recommendation.

As you read on this particular amendment, could a State, in effect, incorporate civil blasphemy as a crime under the argument that it is protecting the flag? For example, could it be made a crime for someone to—where it says "prohibit the physical desecration of the flag of the United States"—could it be made a crime if one were to destroy the flag physically according to the prescribed manual—and I am not being facetious—of the Boy Scouts or the military, where there are means for the proper destruction of a flag that no longer can or should be flown—that could be made legal, and could it be made illegal for someone to destroy the flag, and in the process of destroying the flag, blaspheme God; that the only circumstance under physical destruction of the flag, desecration of the flag, would be a crime would be if it were associated with blasphemous comments relating to a Deity. Is that possible?

Professor **Parrish**. Well, Senator, I think the amendment is so unbounded and so open-ended, as members of the committee have pointed out in the past, that it leaves to the legislatures, both State and Federal, really, the authority to define what is meant by "desecration". And that, of course, is a very broad and vague concept that would leave open, in my opinion, the possibility of punishing a wide range of conduct and speech with respect to the American flag.

The **Chairman**. Let me ask you both the following question. You are both in basic agreement on the proper historical reading of the circumstances under which amendments have been introduced and passed. They have tended to be expansive, with one notable exception, possibly two. But when you look at our amendments, it seems that there are several different reasons, at least one reason, that you all did not mention that the Constitution has been amended. And hasn't one of these reasons been the existence of a powerful national consensus on a social or moral issue, a consensus that will not tolerate diversity among the States or backtracking in the Congress? Hasn't that been one of the circumstances as well, where there has been a national consensus on a social or a moral issue?

Professor **Kutler**. First, I'm not certain which amendments you mean. Second, the word "consensus" gets us into a lot of difficulty.

I think it is wise to remember that the framers of the Constitution, and specifically when they were dealing with the Bill of Rights, were people who rejected majoritarianism, absolute majoritarianism; that there was, of course, a concept of majority rule, but minority rights, that was involved, and that one did not act always in an arbitrary way that imposed an absolute will of a majority.

You could argue that prohibition reflected a kind of consensus in the United States, in many parts of the United States. But we also know that it was powerfully offensive to a very substantial part of the United States, and so much for consensus, because we had to have another amendment eventually.

The **Chairman**. Well, without taking the time to elaborate on them, it seems to me it is far from unprecedented to amend the Constitution to override a Supreme Court decision with approximately one-fourth of the amendments since the Bill of Rights having been designed to do exactly that.

And the Constitution clearly specifies the procedure for rectifying what the Supreme Court has done. It has been done before in our history, and no one seems to have regretted it. Why is it so dangerous to do it now, because there appears to be a national consensus, to take an action that would specifically overrule a Supreme Court decision?

Professor **Kutler**. Well, I don't think there was any particular danger in those. Each one of them represents a kind of unique case, and I am not sure that they give themselves to generalization.

Take, for example, the *Pollock* case on the income tax amendment. I have no doubt, and there is all kinds of testimony at the time, that a law by Congress reenacting income tax in the early 20th century would have passed muster by the Supreme Court, as income tax laws had consistently with the exception of the *Pollock* case.

President Taft, however, a man who had profound regard for the judiciary, having been a judge himself—and I am sure looking down the road and hoping that he would be Chief Justice someday—was a man who was very, very anxious to protect the mystique of the judiciary, and rather than having Congress directly assault that decision, he wanted a constitutional amendment. But the fact is there were other Supreme Court decisions that had upheld income tax before. I'm not certain, Senator, that we should say there was an overwhelming consensus for income tax because that would have people being extremely desirous of paying taxes, and that is not too often.

The CHAIRMAN. I have a few more questions, but I will yield to my colleague.

Senator SPECTER. Thank you very much, Mr. Chairman.

I know that Senator Biden intends to say this, but this may be as good a time as any to note that there had been an intention to have someone present who was going to speak in favor of the constitutional amendment, Professor McDonald, who at last report was in Atlanta at the airport——

The CHAIRMAN. To further elaborate on that, I indicated to the ranking member, Senator Thurmond, that I would invite and be anxious to have any and all constitutional historians wishing to come and testify and anyone that the proponents of the amendment wished to have. And apparently, for reasons related to transportation difficulties, the one person who was chosen to come and testify on behalf of the constitutional amendment from the perspective of a constitutional historian was chosen to be Professor McDonald, and he is—let me ask staff. Is Professor McDonald unable to attend today?

Ms. LIEBERMAN. As of 10:00, he was still in Alabama.

The CHAIRMAN. And he will be unable to be here; we will try to accommodate him at another time. I just want the record to reflect that this and all these hearings are intended to be balanced hearings, and I would ask at this moment that an article in the Wall Street Journal by Professor McDonald be entered in the record at the conclusion of the questions here today as well as any written statement Professor McDonald might have.

The CHAIRMAN. Senator Specter, please proceed.

Senator SPECTER. Thank you very much, Mr. Chairman.

One of the questions that I was interested in was should a statute be tried before a constitutional amendment. I don't have anybody to ask that question of at the moment, and I would like to make a very brief reference to what I conceive to be the appropriate answer. It could come from a variety of sources, but I cite *Escambia County* v. *McMillan,* a U.S. Supreme Court decision at 466 U.S. 49. The Supreme Court renders their answer: "We do not reach these questions, however, as it appears that the judgment under review may rest alternatively upon statutory grant of decision." Where the Supreme Court has said that a statute ought to be tried before a constitutional amendment, I think the most persuasive opinion comes in a Brandeis concurring opinion in the case of *Ashwander* v. *Valley Authority,* where he says: "Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." And that appears at volume 297 U.S. at page 288. Without going further, that expresses my own preference.

I would say, Professor Kutler, that the response of Senator Goldwater on the school prayer amendment, in the face of very strong public opinion to the contrary, was duplicated by quite a number of us in voting against the constitutional amendment for a school prayer amendment.

The opinion that was cited by Professor Parrish by Justice Holmes, I think is the most powerful one that I read while in law school, and if I had to select one phrase which stood out for me more than any other, it was Holmes statement: "Time has upset many fighting faiths." That is a very cardinal principle—the cardinal principle, I think—on the issue of government and freedom of speech.

Justice Holmes did say, as Professor Parrish quoted, that in order to transgress the first amendment, there would have to be something which "imminently threatened immediate interference with the lawful and pressing purposes of the law when an immediate check is required to save the country"; and I think that that does overstate the issue at least as it has been interpreted on clear and present danger, fire in a crowded theater, fighting words, inciting to riot, and a variety of other lines.

But where Professor Parrish noted that the "very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts," that brings us to the issue of a statute, which neither of you gentlemen has addressed, and I understand why. And before moving to the question which is somewhat verboten in many lines as to whether the Supreme Court follows public opinion or the election returns, let me pick up the subject which neither of you has addressed in an issue to draw a judgment from you.

The reasons which you have articulated for not addressing a constitutional amendment, as I have said and as Senator Biden has said, we largely agree with. That is not to say what either of us would do, or at least speaking for myself, not to say what I would do if the statute does not solve the case. I don't have to decide that today.

But Professor Kutler, what do you believe are the public policy considerations to warrant legislation as a general proposition, and do you think those considerations are met by the Biden statute?

Professor KUTLER. Well, I suppose my basic position is I really do not believe there is a compelling public policy that requires a statute at this time. I do not sense, as did Judge Bork, in a statement that I did not read here, that the situation in Texas has afforded some clear and present danger that requires Congress passing a law that will prevent a substantive evil as Holmes speaks of in the clear and present danger process.

I think that this is a very, very isolated incident. I do not see flags being burned around the United States. I think this is an isolated incident, as I say, a one shot that occurs once every few years, and I think that a constitutional amendment is wholly disproportionate, and I'm not certain that a statute is needed. I am not certain that a statute is needed.

Senator SPECTER. But you aren't certain that a statute is not needed.

Professor KUTLER. I really don't see a need for one.

Senator SPECTER. Do you think any statute could be crafted that would pass constitutional muster under *Texas* v. *Johnson?*

Professor KUTLER. Well, I really am not qualified to answer that. I read Lawrence Tribe's testimony, and I thought that that was a marvelous spin on how you could do it and how it cures the defect of the Texas statute as I understand him.

Senator SPECTER. Professor Kutler, that is the only response that is not permitted here, and that is that you are not qualified to answer.

Professor KUTLER. Oh, well——

Senator SPECTER. I am only jesting about that. Until *Texas* v. *Johnson* is overruled, you still have the privilege to say whatever you choose—until we get to seditious libel or civil blasphemy. I hadn't realized we were that close, and you may still say that, Professor Kutler.

Senator SPECTER. How about it, Professor Parrish——

Professor PARRISH. Senator, I——

Senator SPECTER. Let me get my question out first. There have been a number of them posed. The question——

Professor PARRISH. I am sorry. I thought it was the very same question about the statutory approach. I am sorry, forgive me.

Senator SPECTER. Well, public policy to warrant a statute.

Professor PARRISH. I tend to agree with people who have testified here earlier, including Judge Pollak. I think I believe generally in benign neglect with regard to this issue, by which I mean I feel that neither the amendment process nor a statute is really called for, that we do not face such a grave threat to our Nation's security or to the conduct of its government that would justify either the statute or the amendment, and quite frankly, I feel it would be very difficult, although I am not a lawyer and I am not an expert in this area, I feel it would be very difficult to craft an amendment that could be sustained under some of the reasoning of the majority in *Texas* v. *Johnson*, because I cannot conceive of a reason for protecting the flag from desecration unless one already has a very strong and very clear sense of what it symbolizes, and therefore to protect that integrity, the symbolic integrity of the flag, seems to me already to have a presumption, a presumption to interpret the flag in one way, and I am not certain therefore that an amendment could be crafted that would survive a test under the first amendment. And I am not sure we ought to craft such an amendment with such a purpose in mind because I do not regard it as a very pressing issue, as my colleague Professor Kutler has said, and as the young woman from Dallas said to me the other day; she feels there are more important issues that should be confronting the Congress.

Senator SPECTER. Well, before moving to the final question that I have, I would offer this comment to the young woman from Dallas, that neither Senator Biden nor I are unmindful of the other pressing problems which she refers to. And you may be assured, if you see her on the way back, that Senator Biden and I are spending a lot more time on the drug problem than we are on any other issue which we are confronting, as we spend tremendous time on the homeless and on housing and on child care and on a wide range of issues. We have taken a lonely Monday morning in recess to address this issue. Senator Biden is the architect of the drug czar legislation, something which is frequently forgotten, a piece of legislation which was enacted first in 1982 on a bill which was presented to the President in January 1983, which he vetoed, and a little-known and easily-forgotten meeting in the White House, attended by Senator Biden, myself, President Reagan, Vice President Bush and some others, on a special plea to urge him to uphold that bill—a group of seven statutes came to him at the end of the 97th Congress, one of which was the career criminal bill, which I had drafted, and another of which was the drug czar bill, which Senator Biden had crafted.

So, we do not spend an inordinate amount of time on this issue. The constitutional amendment issue has drawn cosponsorship that I last heard of 53 U.S. Senators, and a resolution or a sense of the Senate resolution which came before the Senate shortly after the decision drew 97 Senators, on a 97-to-3 vote. There is very considerable public sentiment and public feeling on this issue which I think has to be considered when we evaluate the varieties of responses. And in opposing a constitutional amendment, which both Senator Biden and I have done, there is a considerable political downside on that, believe it or not——

Professor PARRISH. May I say something on that matter?

Senator SPECTER. As soon as I finish my last comment. We do not hold office for life or good behavior; neither are we tenured.

Yes?

Professor PARRISH. May I say something on that issue of constituent pressures in a system such as ours? I am sensitive to the kinds of pressures that you might be under, because generally speaking, academics are not under that kind of pressure, and I do appreciate the position that Members of the Senate are in. But it seems to me, sir, that people look to you and especially to Members of the Senate for moral leadership and moral guidance about what is right in this country with respect to the Constitution and the Bill of Rights, and that your constituents do look to you for leadership, as they looked to Daniel Webster or to Henry Clay; they didn't expect those gentlemen to simply be passive registers of the popular will. They wanted moral leadership. And it seems to me that supporting the Bill of Rights and the first amendment is the highest type of moral leadership that you could offer. And in light of the courage that both of you showed in judicial appointments a few years ago when you exhibited that kind of courage, it seems to me that this is another time that requires that kind of senatorial leadership in the country.

Senator SPECTER. Well, when you talk about the Bill of Rights, I think you have seen both of us on that line. I wouldn't wish to categorize it as leadership or constitutional statesmanship; I'd prefer to have somebody else do that, if anyone can be found.

But when you talk about the question of the values in a statute where you have a majoritarian position, and you have a very strong national consensus—a concept I am about to come to in my final subject—and you have very, very strong feelings, and you have the flag as a symbol in this country of what it stands for, that it is not a matter of succumbing to emotionalism to accord that kind of a sensitivity and sensibility as to a very strong majoritarian point of view.

We do have the 67-vote requirement of a constitutional amendment, and I am not sure that we will not get it. I think it is likely that we will not, because if there are only 53 sponsors today, it seems doubtful to me that we will get the next 14 to get to 67. We fell very far short on the constitutional amendment on school prayer; there were only 56 ultimately who voted in that direction. So that when you talk about Madisonian majoritarianism—and James Madison is associated with that term—we don't pass constitutional amendment, and I think we will probably not pass one here. But it is a very different set of values on whether we will address the statute.

Let me take up the last point, which is a subject which is not really discussed very much because of the view that the law is sacrosanct, and it comes from the Constitution as written, and it is not subject to the whims of individual Justices, let alone what the majority may feel at a given moment.

Charles Evans Hughes is said to be the author—and I say "said to be" because I didn't hear him say it—of the statement that the Constitution is what the Supreme Court says it is. And there is a famous quote attributed to Findley Peter Dunn, a turn of the century political commentator who used the pen name "Mr. Dooley", who said, "No matter whether the Constitution follows the flag or not, the Supreme Court follows the election returns."

There is a recent opinion by Justice Scalia in *Stanford* v. *Kentucky* in the context of capital punishment for juveniles which refers to a national consensus, giving credence to what a national consensus had to say—true, in a different context, cruel and unusual punishment on the death penalty, which is different from the first amendment issue, but it has certain analogies.

And then you have a number of situations in our constitutional history, and I would quote just two in the interest of time, from "Gunther on Constitutional Law," where at page 152 he refers to *West Coast Hotel* in particular provoked the charge that Justice Roberts had changed his position in the face of the Roosevelt challenge that the "switch in time that supposedly saved the nine" where Justice Roberts made a shift in his votes. Or another citation, again from "Gunther on Constitutional Law" at page 1490, where he points out at footnote 6:

> The decision in *Watkins* and *Sweezy*, together with several contemporaneous ones hearing on subversion, *Yates* and *Konigsberg*, provoked considerable criticism and were frequently mentioned in congressional debates on the 1958 proposals to curtail the Court's appellate jurisdiction.

And then he notes:

> Compare *Barenblatt* v. *Uphouse*, the Federal and State investigation cases of 1959, which follow. Can those decisions be explained as responses to the hostile Congres-

sional reaction? Is there a basis for the allegations that the 1959 decisions were inconsistent with and marked a retreat from *Watkins* and *Sweeney,* the 1957 cases?

In the comments in the Congress and the Court, Walter F. Murphy, a noted constitutional scholar, concluded that the Court did respond to the political pressure in the cases involving investigation of the Communist organization in the 1950's. And I think it worthy of some attention as we draw the hearings to a conclusion, if not in these flag cases, because I think public sentiment is significantly different, and I think there is a great deal to be said for tempering a fast decision, and Senator Biden as Chairman of the Judiciary Committee deserving credit as he slowed the processes down, as is always a wise course—but what is there in our constitutional history which would suggest that Justices are concerned about the temper of the times.

We have had two Supreme Court nominees appear before the Judiciary Committee and promise not to change the law, only to interpret the law. And we have seen a number of decisions come down on affirmative action cases which have flatly changed the 1971 Supreme Court decision in the context that it is up to the Congress to change a longstanding judicial decision. What is there in our constitutional history that suggests that the Court does respond to public pressures, if not senatorial giants like Clay and Webster, and Supreme Court Justices themselves?

Professor KUTLER. Well, I think that what Mr. Dooley, or Findley Peter Dunn, said is by and large a truism, that the Court is responsive to the ebb and flow of public opinion to some extent—not always—the judges have stood their grounds in many ways——

Senator SPECTER. Is it proper for them to be subjected to public opinion at all?

Professor KUTLER. Well, whether it is proper, I am not certain is quite the correct question. I don't think they can avoid it. There are the descriptions of the Justices watching the Watergate hearings and were clearly affected by what was going on.

Senator SPECTER. We can't say they can't watch television, but when they write their opinions are they supposed to be influenced by public opinion?

Professor KUTLER. Are they supposed to be?

Senator SPECTER. Should they be, and then are they.

Professor KUTLER. I think they are, I think they are.

Senator SPECTER. OK.

Professor KUTLER. But I think the incidents you were just talking about, the various cases, *Watkins* and *Sweezy* and *Jenks* and so forth—it was very interesting when you quoted Walter Murphy's book, because it is well to remember there that Congress withstood the challenge to repudiate the Court and voted down the legislation before the Court acts in *Barenblatt.*

Senator SPECTER. So, Congress was strong, but how about the Court?

Professor KUTLER. Do you mean the Court waffling in *Barenblatt,* as some people would argue? Well, maybe they did; I'm not sure that they did.

Senator SPECTER. Are you going to leave the Parrish case with Professor Parrish?

Professor Kutler. I think the real change occurs in the other case in 1937, in the *National Labor Relations Board* case. I think that is where there is clearly—Justice Roberts switched his judicial philosophy, and I think that he did so for fear of the safety of the institution as much as anything else.

Professor Parrish. I think it is now just as a footnote generally accepted among students of the Court in the thirties that Justice Roberts' vote in the *Parrish* case was cast prior to the Court-packing plan, to the unveiling of that. It may perhaps have come in the wake of the 1936 reelection of President Roosevelt, which of course was a stunning landslide. But there is also considerable evidence that the *Parrish* case on the facts and in terms of the briefs submitted was very different from the case the Court struck down I think about 7 months before, which was a New York case, I believe, and that Justice Roberts may not have changed his views at all with respect to the specific issues involved in the *Parrish* case. It is a very tough call.

Senator Specter. Those are all my questions, Mr. Chairman.

Professor Kutler. Senator, may I say one thing here in terms of the Justices responding to popular opinion. I have no reason to believe that if the Supreme Court as presently constituted were to hear the same case a year from now, and in the light of this outcry that we have heard, what I think is a very temporary outcry, would necessarily change their opinion. I really don't think they would.

Senator Specter. Not necessarily, but maybe.

Professor Kutler. Maybe; incidentally, when the opinions that Judge Pollak referred to today, *Gobitis* and *Barnette,* when the Court changed there, the Court incidentally did not necessarily change in response to public opinion. They changed in response to their own perception of things. The fact is that the *Gobitis* decision, as the Justice Department did testify, served as an occasion for a good deal of persecution of Jehovah's Witnesses, and this alarmed many people. But I don't know that there was any overwhelming public opinion that the Court change its mind on the flag salute business.

Senator Specter. Mr. Chairman, that concludes my questions. I would just ask unanimous consent that there appear in the record a "Law Review" article by Mr. Justice Frankfurter, defending Justice Roberts saying he did not change his opinion in response to public outcry from 1955 in defense of a former dean of the Penn Law School.

The Chairman. Without objection, it will be entered.

["Law Review" article follows:]

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OWEN J. ROBERTS

In Memoriam

Felix Frankfurter
Edwin R. Keedy
Robert T. McCracken
Erwin N. Griswold
John J. McCloy
Clarence K. Streit
William E. Lingelbach
George Wharton Pepper

Jurisdiction Over Foreign Corporations:
An Analysis of Due Process

Pickpocketing: A Survey of the Crime
and Its Control

University of Pennsylvania
Law Review
FOUNDED 1852

Formerly
American Law Register

Volume 104 December, 1955 No. 3

MR. JUSTICE ROBERTS

Felix Frankfurter †

The dictum that history cannot be written without documents is less than a half-truth if it implies that it can be written from them. Especially is this so in making an assessment of individual contributions to the collective results of the work of an institution like the Supreme Court, whose labors, by the very nature of its functions, are done behind closed doors and, on the whole, without leaving to history the documentation leading up to what is ultimately recorded in the United States Reports. To be sure, the opinions of the different Justices tell things about them—about some, more; about some, less. As is true of all literary compositions, to a critic saturated in them, qualities of the writer emerge from the writing. However, even in the case of an opinion by a Justice with the most distinctive style, what is said and what is left unsaid present to students of the Court a fascinating challenge of untangling individual influences in a collective judgment.

To discover the man behind the opinion and to estimate the influence he may have exerted in the Court's labors, in the case of Mr. Justice Roberts, is an essentially hopeless task. Before I came on the Court, I had been a close student of its opinions. But not until I became a colleague, and even then only after some time, did I come to realize how little the opinions of Roberts, J. revealed the man and therefore the qualities that he brought to the work of the Court. In his case it can fairly be said the style—his judicial style—was not the man.

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The *esprit* of Roberts' private communications leave little doubt that when he came to writing his opinions he restrained the lively and imaginative phases of his temperament. I speak without knowledge, but he had evidently reflected much on the feel and flavor of a judicial opinion as an appropriate expression of the judicial judgment. The fires of his strong feelings were banked by powerful self-discipline, and only on the rarest occasion does a spark flare up from the printed page. The sober and declaratory character of his opinions was, I believe, a form consciously chosen to carry out the judicial function as he saw it. We are told that Judge Augustus N. Hand, in disposing of a case that excited much popular agitation, set himself to writing an opinion in which nothing was "quotable." The reasons behind this attitude doubtless guided Justice Roberts in fashioning his judicial style. Moreover, his was, on the whole, a hidden rather than an obvious nature—hidden, that is, from the public view. His loyalties were deep, as was his devotion to his convictions. Both were phases of an uncompromising honesty. They constituted the most guarded qualities of his personality, and he would not vulgarize them by public manifestation.

In not revealing, indeed in suppressing, the richer and deeper qualities of his mind and character, the Roberts opinions reflect his own underestimation of his work. Partly, he was a very modest man, partly his judicial self-depreciation expressed his sense of awe to be a member of the bench charged with functions in the language of Chief Justice Hughes, "of the gravest consequence to our people and to the future of our institutions." Above all, the standards for his self-appraisal were, characteristically, judges of the greatest distinction in the Court's history. On leaving the bench, he wrote: "I have no illusions about my judicial career. But one can only do what one can. Who am I to revile the good God that he did not make me a Marshall, a Taney, a Bradley, a Holmes, a Brandeis or a Cardozo."

Roberts was unjust to himself. He contributed more during his fifteen years on the Court than he himself could appraise. His extensive, diversified experience at the bar and his informed common sense brought wisdom to the disposition of the considerable body of litigation, outside the passions of popular controversy, that still comes before the Court. Again, his qualities of character—humility engendered by consciousness of limitations, respect for the views of others whereby one's own instinctive reactions are examined anew, subordination of solo performances to institutional interests, courtesy in personal relations that derives from respect for the conscientious labor of others and is not merely a show of formal manners—are indispensable qualities for the work of any court, but preeminently for that of the Supreme Court. Probably no Justice in the Court's history attached more significance to these qualities than Mr. Justice Brandeis. It tells more than pages of argumentation that Brandeis held Roberts in especial esteem as a member of the Court.

It is one of the most ludicrous illustrations of the power of lazy repetition of uncritical talk that a judge with the character of Roberts should have attributed to him a change of judicial views out of deference to political considerations. One is more saddened than shocked that a high-minded and thoughtful United States Senator should assume it to be an established fact that it was by reason of "the famous switch of Mr. Justice Roberts" that legislation was constitutionally sustained after President Roosevelt's proposal for reconstructing the Court and because of it. The charge specifically relates to the fact that while Roberts was of the majority in *Morehead v. New York ex rel. Tipaldo,* 298 U.S. 587, decided June 1, 1936, in reaffirming *Adkins v. Children's Hospital,* 261 U.S. 525, and thereby invalidating the New York Minimum Wage Law, he was again with the majority in *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, decided on March 29, 1937, overruling the *Adkins* case and sustaining minimum wage legislation. Intellectual responsibility should, one would suppose, save a thoughtful man from the familiar trap of *post hoc ergo propter hoc.* Even those whose business it is to study the work of the Supreme Court have lent themselves to a charge which is refuted on the face of the Court records. It is refuted, that is, if consideration is given not only to opinions but to appropriate deductions drawn from data pertaining to the time when petitions for certiorari are granted, when cases are argued, when dispositions are, in normal course, made at conference, and when decisions are withheld because of absences and divisions on the Court.

It is time that this false charge against Roberts be dissipated by a recording of the indisputable facts. Disclosure of Court happenings not made public by the Court itself, in its opinions and orders, presents a ticklish problem. The secrecy that envelops the Court's work is not due to love of secrecy or want of responsible regard for the claims of a democratic society to know how it is governed. That the Supreme Court should not be amenable to the forces of publicity to which the Executive and the Congress are subjected is essential to the effective functioning of the Court. But the passage of time may enervate the reasons for this restriction, particularly if disclosure rests not on tittle-tattle or self-serving declarations. The more so is justification for thus lifting the veil of secrecy valid if thereby the conduct of a Justice whose intellectual morality has been impugned is vindicated.

The truth about the so-called "switch" of Roberts in connection with the *Minimum Wage* cases is that when the *Tipaldo* case was before the Court in the spring of 1936, he was prepared to overrule the *Adkins* decision. Since a majority could not be had for overruling it, he silently agreed with the Court in finding the New York statute under attack in the *Tipaldo* case not distinguishable from the statute which had been declared unconstitutional in the *Adkins* case. That such was his position an alert reader could find in the interstices of the United States Reports. It took not a little persuasion—so indifferent was Roberts to misrepresentation—to induce him to set forth what can be extracted from the Reports.* Here it is:

> "A petition for certiorari was filed in *Morehead v. Tipaldo,* 298 U.S. 587, on March 16, 1936. When the petition came to be acted upon, the Chief Justice spoke in favor of a grant, but several others spoke against it on the ground that the case was ruled by *Adkins v. Children's Hospital,* 261 U.S. 525. Justices Brandeis, Cardozo and Stone were in favor of a grant. They, with the Chief Justice, made up four votes for a grant.
>
> "When my turn came to speak I said I saw no reason to grant the writ unless the Court were prepared to re-examine and overrule the *Adkins* case. To this remark there was no response around the table, and the case was marked granted.
>
> "Both in the petition for certiorari, in the brief on the merits, and in oral argument, counsel for the State of New York took the position that it was unnecessary to overrule the *Adkins* case in order to sustain the position of the State of New York. It was urged that further data and experience and additional facts distinguished the case at bar from the *Adkins* case. The argument seemed to me to be disingenuous and born of timidity. I could find nothing in the record to substantiate the alleged distinction. At conference I so stated, and stated further that I was for taking the State of New York at its word. The State had not asked that the *Adkins* case be overruled but that it be distinguished. I said I was unwilling to put a decision on any such ground. The vote was five to four for affirmance, and the case was assigned to Justice Butler.
>
> "I stated to him that I would concur in any opinion which was based on the fact that the State had not asked us to re-examine or overrule *Adkins* and that, as we found no material difference in the facts of the two cases, we should therefore follow the *Adkins* case. The case was originally so written by Justice Butler,

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* Mr. Justice Roberts gave me this memorandum on November 9, 1945, after he had resigned from the bench. He left the occasion for using it to my discretion. For reasons indicated in the text, the present seems to me an appropriate time for making it public.

but after a dissent had been circulated he added matter to his opinion, seeking to sustain the *Adkins* case in principle. My proper course would have been to concur specially on the narrow ground I had taken. I did not do so. But at conference in the Court I said that I did not propose to review and re-examine the *Adkins* case until a case should come to the Court requiring that this should be done.

"August 17, 1936, an appeal was filed in *West Coast Hotels* [sic] *Company v. Parrish,* 300 U.S. 379. The Court as usual met to consider applications in the week of Monday, October 5, 1936, and concluded its work by Saturday, October 10. During the conferences the jurisdictional statement in the *Parrish* case was considered and the question arose whether the appeal should be dismissed* on the authority of *Adkins* and *Morehead.* Four of those who had voted in the majority in the *Morehead* case voted to dismiss the appeal in the *Parrish* case. I stated that I would vote for the notation of probable jurisdiction. I am not sure that I gave my reason, but it was that in the appeal in the *Parrish* case the authority of *Adkins* was definitely assailed and the Court was asked to reconsider and overrule it. Thus, for the first time, I was confronted with the necessity of facing the soundness of the *Adkins* case. Those who were in the majority in the *Morehead* case expressed some surprise at my vote, and I heard one of the brethren ask another, 'What is the matter with Roberts?'

"Justice Stone was taken ill about October 14. The case was argued December 16 and 17, 1936, in the absence of Justice Stone, who at that time was lying in a comatose condition at his home. It came on for consideration at the conference on December 19. I voted for an affirmance. There were three other such votes, those of the Chief Justice, Justice Brandeis, and Justice Cardozo. The other four voted for a reversal.

"If a decision had then been announced, the case would have been affirmed by a divided Court. It was thought that this would be an unfortunate outcome, as everyone on the Court knew Justice Stone's views. The case was, therefore, laid over for further consideration when Justice Stone should be able to participate. Justice Stone was convalescent during January and returned to the sessions of the Court on February 1, 1937. I believe that the *Parrish* case was taken up at the conference on February 6, 1937, and Justice Stone then voted for affirmance. This made it possible to assign the case for an opinion, which was done. The decision affirming the lower court was announced March 29, 1937.

"These facts make it evident that no action taken by the President in the interim had any causal relation to my action in the *Parrish* case."

More needs to be said for Roberts than he cared to say for himself. As a matter of history it is regrettable that Roberts' unconcern for his own record led him to abstain from stating his position. The occasions are not infrequent when the disfavor of separate opinions, on the part of the bar and to the extent that it prevails within the Court, should not be heeded. Such a situation was certainly presented when special circumstances made Roberts agree with a result but basically disagree with the opinion which announced it.

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* Evidently he meant should be reversed summarily, since the Washington Supreme Court had sustained the statute.

The crucial factor in the whole episode was the absence of Mr. Justice Stone from the bench, on account of illness, from October 14, 1936, to February 1, 1937. 299 U.S. at iii.

In *Chamberlain v. Andrews* and its allied cases, decided November 23, 1936, the judgments of the New York Court of Appeals sustaining the New York Unemployment Insurance Law were "affirmed by an equally divided Court." 299 U.S. 515. The constitutional outlook represented by these cases would reflect the attitude of a Justice towards the issues involved in the *Adkins* case. It can hardly be doubted that Van Devanter, McReynolds, Sutherland and Butler, JJ. were the four Justices for reversal in *Chamberlain v. Andrews, supra*. There can be equally no doubt that Hughes C.J. and Brandeis and Cardozo, JJ. were for affirmance. Since Stone, J. was absent, it must have been Roberts who joined Hughes, Brandeis and Cardozo. The appellants petitioned for a rehearing before the full bench, but since the position of Stone, as disclosed by his views in the *Tipaldo* case, would not have changed the result, *i.e.*, affirmance, the judgments were allowed to stand and the petition for rehearing was denied. Moreover, in preceding Terms, Roberts had abundantly established that he did not have the narrow, restrictive attitude in the application of the broad, undefined provisions of the Constitution which led to decisions that provoked the acute controversies in 1936 and 1937.

Indeed, years before the 1936 election, in the 1933 Term, he was the author of the opinion in *Nebbia v. New York*, 291 U.S. 502, which evoked substantially the same opposing constitutional philosophy from Van Devanter, McReynolds, Sutherland and Butler, JJ. as their dissent expressed in *West Coast Hotel Co. v. Parrish, supra*. The result in the *Nebbia* case was significant enough. But for candor and courage, the opinion in which Roberts justified it was surely one of the most important contributions in years in what is perhaps the most far-reaching field of constitutional adjudication. It was an effective blow for liberation from empty tags and meretricious assumptions. In effect, Roberts wrote the epitaph on the misconception, which had gained respect from repetition, that legislative price-fixing as such was at least presumptively unconstitutional. In his opinion in *Parrish*, the

Chief Justice naturally relied heavily on Roberts' opinion in *Nebbia,* for the reasoning of *Nebbia* had undermined the foundations of *Adkins.*

Few speculations are more treacherous than diagnosis of motives or genetic explanations of the position taken by Justices in Supreme Court decisions. Seldom can attribution have been wider of the mark than to find in Roberts' views in this or that case a reflection of economic predilection. He was, to be sure, as all men are, a child of his antecedents. But his antecedents united with his temperament to make him a forthright, democratic, perhaps even somewhat innocently trusting, generous, humane creature. Long before it became popular to regard every so-called civil liberties question as constitutionally self-answering, Roberts gave powerful utterance to his sensitiveness for those procedural safeguards which are protective of human rights in a civilized society, even when invoked by the least appealing of characters. See his opinions in *Sorrells v. United States,* 287 U.S. 435, 453, and *Snyder v. Massachusetts,* 291 U.S. 97, 123.

Owen J. Roberts contributed his good and honest share to that coral-reef fabric which is law. He was content to let history ascertain, if it would, what his share was. But only one who had the good fortune to work for years beside him, day by day, is enabled to say that no man ever served on the Supreme Court with more scrupulous regard for its moral demands than Mr. Justice Roberts.

The CHAIRMAN. I would like to ask, Professor, your permission to put your entire statement in the record as if read.

I do have a few questions. I understand my colleague may have to leave, but I have a few questions if you will allow me to trespass on your time a little more.

Both of you make, I think, a very compelling case for, if you will, a structure within which constitutional amendments have been considered and why this amendment, with possibly the single exception of prohibition, falls outside that historical development that has taken place of how we have considered constitutional amendments.

Now let me ask you—do you think the reason why so many proposed constitutional amendments have been rejected is because they are perceived to fall outside of this construction, or is it because of the exigencies of the moment that they fail? I mean, is there any historical evidence that the Congress and the States have debated whether or not to accept certain amendments within the limitations that you both set out in your statements, which is basically that we only amend when we are expanding; we do not amend to grant more power to government, et cetera.

Professor PARRISH. Well, Senator, I think it would be hard to generalize about all of the amendments proposed in the Congress, why they have not been voted upon or sent to the States, or why the ratification has failed. It seems to me they may have failed under two broad categories. One would be the trivialization point that Professor Kutler made that many of these amendments proposed, for example, have simply been regarded as far too trivial to be embodied in the Constitution, that to adopt that approach would turn the Constitution into a massive code similar to many of the State constitutions like Louisiana or California, which of course are volumes in terms of their size.

There has been a fear, I think, of trivializing the Constitution, which has prevented most of these from coming to a vote.

I think, quite frankly, a few of the others have failed because they so seriously challenge in many ways some very deep-rooted and fundamental political and economic structures in this country. I would point to the child labor amendment in the inter-war period, and quite frankly, the equal rights amendment. I think that there were powerful forces working in opposition to those amendments. But I would hesitate to generalize about all the rest in terms of why they failed to be ratified.

Professor KUTLER. I would agree with that, trivialization plus opposition from powerful entrenched groups. When you had the child labor amendment trying to go through in the 1930's, by then you had the Depression, and a lot of families could only get their children working, so they weren't so keen for a child labor amendment. And certainly in our own time, we well know what happened with the equal rights amendment in terms of just arousing some very, very powerful minority groups, but who articulated and organized their case very, very well. So, there are all kinds of reasons.

The CHAIRMAN. One of the phrases used this morning several times is that the proposed amendment as opposed to statute—the proposed amendment—would pose a grave threat to the first amendment, and that phrase "grave threat" has also been used in the context that burning of flags poses no grave threat to the country.

Now, when Senator Specter pursued the issue of a statute versus an amendment, the comment made by one or both of you was that it doesn't seem to be a pressing enough issue for us to even move in the direction of a statute.

Let me ask you this: Would passage of a statute, in your view, whether or not there is a pressing need, in your opinion, would it pose any grave threat to the Republic, to the Constitution, or to anything else if it were to be passed?

Professor KUTLER. I said before that I think not. I think what it does, however, is to draw into question a whole body of free speech protection that we really have created—recognized, I should say—in the last generation, and that is of symbolic speech. There is, I think, a danger to that developing doctrine of symbolic speech which has served to reflected the changed nature of the society.

The CHAIRMAN. Let me pursue that for a moment. It seems to me that at least the statute that I have drafted, with the help of many, does not do what you are worried about, and that is call in question symbolic speech. If you will note, the Court in its majority opinion, Justice Brennan said:

> To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries.

It goes on to say:

> In evaluating these choices under the First Amendment, how would we decide which symbols are sufficiently special to warrant this unique statute?

It then goes on to say:

> There is, moreover, no indication, either in the text of the Constitution or in our cases interpreting it, that a special judicial category should exist for the American flag.

Now, as you both know better than I, there have been basically two levels of scrutiny that the Court uses in determining whether or not the State has moved into a category that impacts or impinges upon the first amendment—level one, which is referred to usually as the stricter measures, and level two, which is more like the rational basis test. In level one, there has to be a compelling State interest. But if there is a compelling State interest, it is constitutionally possible and legal for the State to take an action that impacts upon one's ability to express a notion, an idea, in a certain form or not in a particular form. And if there is a rational basis, it is in fact a less difficult test to have to pass if you fall into that category, and in that category, I think there is some confusion because we keep talking about if the action taken by statute impacts upon expression. In fact, there are many statutes that impact upon expression. But only those which target political expression are the statutes that have been declared to be unconstitutional. So, you clearly can impact upon—to take the most bizarre example, you cannot assassinate a U.S. Senator to make a political point—I mean, you can, but it is not constitutionally protected. It is not a defense in court to say, "I blew away Biden because I wanted to prove that there are insensitive people in the Congress who are unwilling to deal with this fascist government we have," et cetera—you cannot do that. That is the one ridiculous extreme.

But also, if you go to the *O'Brien* case, it would fall into the second category, where you say that burning a draft card can in fact have a purpose that, although it impacts upon freedom of expression—you cannot burn a draft card, saying, "I am burning this draft card because I am protesting the horrible war in Vietnam." The law against burning the draft card was not targeted against a particular type of expression—it impacted upon it, but it was not targeted.

So, if you go back and look at the decision, I'd like to try to put two points together and ask them in terms of a question—I may be wrong; I am not sure that I am at all correct in this. By the way, I might note parenthetically, the only thing that surprised me about the *Texas* v. *Johnson* case is not the outcome, because the way the statute is written, it seems to me that no one should have been surprised that it at least could have come out this way. The only thing that surprised me is the inability of the Court to determine whether or not the flag is a unique national symbol. I find that somewhat perplexing and, I might add, preposterous, that it not be able to determine whether the flag is unique, a unique national symbol. But if the Congress clears up that concern for the Court, and that is how can they decide, because there is no consensus, they say, we clearly state in law that it is the consensus that the unique national symbol is the flag, is it not possible that having done that and making the burning of the flag illegal, that we are in fact impacting upon expression but not targeting political expression when we say you cannot burn that unique national symbol? Are you following me?

Professor **Parrish**. Yes.

The **Chairman**. Would you respond to that?

Professor **Parrish**. I only can perhaps repeat the observation—I believe it was Dean Griswold who made it before your committee a week ago—what other reason would you have for passing this statute except to protect in effect the symbolic integrity of the flag, and therefore you have already reached a conclusion about what the flag means.

The draft card, it seems to me, in the *O'Brien* case, served a double purpose. Not only was it a powerful symbol, but also it was very important to the administrative functioning of the selective service system and to carrying out the authority of Congress under article I.

Frankly, Senator, I don't know what article I authority you have for a statute with respect to flag burning. I have always been puzzled by that in terms of what article I power would be invoked by the Congress for such legislation.

The draft card seems to me a very clear case of your authority with respect to providing rules and regulations for the armed forces, but I do not——

The **Chairman**. Let me ask you this question—and again, these are truly questions; I am not at all certain that I am correct on this point. I purchase a house right around the corner from here that happens to be on the Historical Register. I own it free and clear—well, the bank and I own it—I don't, but let's assume I do.

And I decide that I want to paint the front of that house yellow. I cannot do that under the law. I want to paint it red because I want to make a political statement. I want to paint the hammer and sickle on the front of that house to make the point in the midst of this celebration of the Republic here in Independence Square and Independence Mall that this is really a fascist government, and we should in fact have a Communist system. I am not allowed to do that. Is the State, by passing such a law, impacting upon my freedom of expression, my freedom of speech?

Professor **Kutler**. Well, it seems to me that that law—and I presume you mean the National Historical Preservation Act and so forth——

The **Chairman**. Yes.

Professor **Kutler**. Congress made itself very clear as to what it intended there. There was a clear legislative purpose——

The **Chairman**. Which was?

Professor **Kutler**. To preserve the national treasures of the United States in as pristine a fashion as possible.

The **Chairman**. Why?

Professor **Kutler**. In terms of the culture of the United States, the historical traditions and so forth. And I think all this is very, very clear in the statute.

My problem, Senator, reading the piece of paper you provided us for this statute, is that to use your words, I really do not know what is being targeted except to see it as a response to those who wish to protest the political policies of this country or the political actions of this country by mutilating, defacing, burning, destroying a flag.

The **Chairman**. How is it different—and again, these are genuine questions; I'm not trying to——

Professor **Kutler**. Well, that is my confusion on the statute.

The **Chairman**. Well, let me further confuse you——

Professor **Parrish**. May I respond?

The **Chairman**. Please, yes.

Professor **Parrish**. Initially, it seems to me that a very important difference between the example you cite of a very unique and peculiar historical home, for example, like the Hayes-Adams House or Mount Vernon, for example, would be that there is only one Mount Vernon——

The **Chairman**. No, let me make it clear. That is not what the act does. The act that I am referring to goes well beyond that.

Professor **Parrish**. I understand that. I understand that.

The **Chairman**. OK.

Professor **Parrish**. It seems to me that with respect to a unique national treasure, such as a unique home——

The **Chairman**. I agree; no question.

Professor **Parrish** [continuing]. And the American flag which I might purchase at the Walgreen's drugstore, it is a very important difference——

The **Chairman**. Absolutely clear.

Professor **Parrish** [continuing]. In terms of the public interest and in terms of the private rights.

The **Chairman**. Absolutely certain. But they are not the bulk of the homes that are on the National Historical Register. There are thousands of homes that are extremely pedestrian, that are no different than the rowhouses you will walk out here and find tens of them in a row.

Now, I often get the same kind of response when I am told, well, you cannot deface the Washington Monument. No, I am not making that argument at all. And by the way, you can move to get your home put on that list.

Professor **Kutler**. It's called a tax break.

The **Chairman**. That's right. And there are thousands of homes, many carbon copies of one another, and some when you look at, you wonder how they could have any, any significance other than the fact that they were built 200 years ago.

The real reason why we are preserving those homes, as stated by the statute, is to preserve not the physical home but the embodiment of the culture of the time. That is what it is all about. We are not preserving those homes because we want people to live in them. We are not preserving those homes because they have a utilitarian purpose. We are not preserving those homes even because they are unique, that there are only a few of them. The intention of preserving those homes was the notion that we should somehow maintain some notion of the culture that in fact makes up and made up this country.

Now, let me ask you how is that different than preserving on principle a symbol? Preserving the culture that no longer exists, how is that in fact different from preserving a symbol?

Professor **Parrish**. I can only speak personally, Senator, that the flag for me is in my heart, and therefore whether one flag is burned or two flags are burned next week does not affect the symbolic importance and how I value that symbol, because I carry the flag in my heart, and what another person may do to that, even though I strongly and powerfully disagree with it, I would say that's the price we pay for having a first amendment in this country.

The **Chairman**. Now, I could say that whether or not your somewhat dilapidated home, built in 1735, exists or does not exists in no way in fact impacts upon where I carry the culture and my respect for the culture of this country. It is in my heart. It is in my heart, it is in my head. It is not in your deed. And I think the vast majority of Americans feel that way; the vast majority of Americans carry and revere the culture and history of this country in their hearts, not in the physical embodiment of that culture by pointing to the home that I used to live in that was built in 1723. And whether or not in my neighborhood, I burn down and bulldoze my home to put up a more attractive home than the one that was there would have probably been cheered by my fellow neighbors, because it would have increased their property values.

So, I'm not trying to be argumentative. You see, this notion that I find somewhat elitist that because you can buy a flag in a Walgreen's drugstore, or because there are so many of them and they are not unique, somehow automatically puts it beyond the purview of something that should be protected because of its symbolic value—let me give you an argument of why I am so supportive of doing something about "protecting the flag."

It seems to me that our flag, unlike almost any other nation's flag, serves the purpose of being a unifying mechanism for what is probably the most heterogeneous democracy in the history of mankind. You cannot define what constitutes being an American based upon one's religion, one's heritage, one's background, one's race. The only thing that defines what constitutes an American is whether or not there is a basic adherence to the principles embodied in the Constitution—that is, that we are basically going to realize or attempt to realize our aspirations and our hopes through that vehicle, that there are the groundrules upon which we play, and that the single most significant and universally acknowledged symbol of those principles is the flag, and that when we live in a Nation where by the year 1995, you are going to have people of European stock being in an absolute minority in this country, when it is difficult to define us in any other way, that it is a useful and legitimate State interest to maintain that symbol.

Why is that inappropriate?

Professor KUTLER. Well, Senator, I am not certain it is inappropriate, but it isn't the flag that is going to protect us, then, in the situation you imagine; it is the Constitution.

Judge Bork said that we wouldn't punish anybody who stood on the street corner and burned the Constitution; it is OK to do that if somebody burns the flag. Well, I'm not so certain I treasure his priority of values there.

The President of the United States takes an oath to protect and defend the Constitution of the United States, not the flag. Immigrants who come to this country to become citizens take an oath to the Constitution.

I think the flag, Senator, is a very, very emotional thing that has taken on a greater life of its own over the last number of years. I think it is a lot different than when I was a child and when I was learning scouting principles and so forth; then one knew that the flag came down in the middle of a rainstorm. Now everybody is afraid to take it down; they might show disrespect.

I think, though, that the greater value is within the Constitution itself, and that is something of substance, that is something that protects us.

Senator Kerrey said in that wonderful piece that was published in the Washington Post a few weeks ago that he didn't go to Vietnam to defend the flag. He went there because he was defending his country, as he saw it, the interests of his country.

Professor PARRISH. I would only just add very briefly that of course it is a very powerful and potent symbol of what our country stands for. The unity, however, that it does represent is the unifying principles that we are a country that tolerates diversity and that does indeed tolerate a dissent, even rough and vigorous dissent that may offend the sensibilities of large numbers of people. And it seems to me that principle is something that flag also stands for, and that we should bear that in mind as well.

The CHAIRMAN. I agree; I don't see, though, how protecting the flag in all circumstances without regard to the rationale or reason for destroying the flag in any way, not only material way, but any even incidental way, impacts upon one's ability to register their dissent, but——

Senator **Specter**. This last exchange may be a good summary of a lot of the underlying legal issues. I would disagree with you, Professor Kutler, about any change in attitude toward the flag. I think there has been, beyond your boyhood, which encompasses my boyhood, the same kind of fervor about the flag. But when you talk about punishing the schoolchildren in West Virginia for not saluting the flag, it was in a very different context than *Texas* v. *Johnson*. But maybe the complex legal issues are encapsulated when Senator Biden poses the question do you consider it a major threat to this country to pass a statute, and the answer was no, no major threat to this country. Perhaps the appropriate middle ground, as we are a country of centrists, turns on rejecting the constitutional amendment, which may pose some threat, which is why Senator Biden and I are reluctant to do that if we can solve it otherwise, but that it is an appropriate view not to respond to majoritarianism by changing the Constitution, which is supposed to protect against majoritarianism. But it is appropriate to respond to majoritarianism, the majority, by statute, which is where we say majority rule does prevail. And there are many people who are called upon to do many things for our country where people do not understand the refinements of "clear and present danger" or "time has upset many fighting faiths". There are many values which are cherished at the VFW Convention, which is different from the American Bar Association Convention or a convention of constitutional professors, where people really do recoil to the flag burning, and maybe that proper balance is to say a statute will accommodate their interests as long as we don't tamper with fundamental first amendment freedoms.

Maybe James Madison had it all—he proposed the first amendment 100 feet away, and he is the father of the doctrine of majoritarian rule on Madisonian majoritarianism.

Professor **Kutler**. I can't disagree with that.

The **Chairman**. I want to make it clear, and I mean this sincerely, how much I not only was impressed with your testimony, but respect the point of view. I don't think this is a clearcut issue.

Professor **Parrish**. I don't either, Senator.

The **Chairman**. I am not suggesting that it is. And I must acknowledge that my reaction, although I am going to and have attempted to couch it in intellectual terms, is in fact visceral as well. And I cannot deny that, to put it in the negative sense, my middleclass background has gotten the worst of me, and in the positive sense, my middleclass background has gotten the best of me.

But I do think, notwithstanding that, which I acknowledge—I acknowledge that this issue starts in my heart and works its way to my head. But having spent a great deal of time on what some would suggest are the legal niceties of the question, once it has arrived here, I am still of the view and feel very strongly that it is constitutionally possible because of the uniqueness of the Texas statute and the grounds upon which that statute was held to be unconstitutional to pass a statute—a neutral statute—which would make the burning of the flag in all circumstances unlawful, that that is possible and likely held to be constitutional.

It is a separate issue—and you have been kind enough to share your views—it is a separate issue as to whether or not it is advisable to do that. I happen to think it is, but we will all find out.

Let me conclude by saying I am sorry Professor McDonald could not be here today, and there are others who share Professor McDonald's view, and those views will be taken into consideration by this committee. But I am of the view that if we were to pass a statute, even if I am wrong, which is clearly within the realm of possibility—I have been wrong many times, as the record will show—even if I am wrong, and such a statute is unconstitutional—as they say, nothing is lost for those who wish to protect the flag—and that is that it is unlawful until it is declared unconstitutional. So, the moment we pass the statute, it is unlawful, and the moment, if it were to be declared unconstitutional, that occurs, all the options are still left open to the U.S Congress. But I would argue that we should tread very lightly going in that direction, and we should tread very lightly now.

Again, I truly appreciate it, particularly in light of the fact you came such a distance to testify. I sincerely appreciate it and hope that you get an opportunity before you leave to have a Philadelphia cheesesteak or a Wilmington, Delaware, submarine sandwich, which is far superior to anything you can buy in Philadelphia. [Laughter.]

Senator SPECTER. I am glad all the cameras are down.

The CHAIRMAN. I hope they are up.

I would also ask unanimous consent that a statement by Senator Thurmond and a statement by Stephen Nagler, Executive Director of the National Constitution Center, be entered into the record.

[Statements by Senator Thurmond and Mr. Nagler follow:]

REPORTER

STATEMENT BY SENATOR STROM THURMOND (R-S.C.) AT THE OLD CITY HALL IN PHILADELPHIA, PENNSYLVANIA, REFERENCE, THE PHYSICAL DESECRATION OF THE FLAG OF THE UNITED STATES. AUGUST 14, 1989.

MR. CHAIRMAN:

Due to a prior commitment, I am unable to be with you today for our second hearing on protecting the American flag from physical desecration. However, I want to commend you for scheduling today's hearing as we continue to pursue the proper course to ensure the integrity of our Nation's most revered symbol of democracy.

It is indeed appropriate that this hearing be held in Philadelphia as we receive testimony on the amendment process under our Constitution. The State House in this historic city was the site where our founding fathers gathered during the summer of 1787 to write our Constitution.

During that long summer, the drafters included procedures to amend the Constitution and they are set out in Article V. As you know, Mr. Chairman, two-thirds of both Houses of Congress can propose amendments or two-thirds of the State legislatures can call a constitutional convention for proposing amendments. These proposed amendments become a part of our Constitution when ratified by three-fourths of the State legislatures.

I believe it is important to note that since the Bill of Rights - the first ten amendments - were adopted, one-fourth of the remaining amendments were proposed to overturn particular

Supreme Court decisions. It is not a novel idea to amend the Constitution in response to Supreme Court decisions.

Mr. Chairman, you have distinguished witnesses to hear from today and I look forward to reviewing their testimony.

Again, I want to commend the Chairman for his efforts as we determine the most effective and sound course for overturning the Supreme Court's decision in Texas v. Johnson which allows the contemptuous burning of the American flag.

-END-

National
Constitution
Center

Statement of Stephen M. Nagler,
Executive Director,
National Constitution Center

before the

Judiciary Committee of the
United States Senate

August 13, 1989

convened at

Old City Hall,
Independence National Park
Philadelphia, PA

Mr. Chairman, members of the Committee, I would like to thank you for the opportunity to appear before you today to present testimony on the proposal to amend the Constitution by excluding flag desecration from the First Amendment protection of freedom of expression.

The National Constitution Center which I represent is a non-partisan, non-prescriptive organization founded in the wake of the Bicentennial of the Constitution to combat the problem of civic illiteracy which impairs the ability of many Americans to participate fully and effectively as citizens of a democratic society. Our purpose is to further public knowledge and understanding of the document which structures our government and frames our rights: the Constitution of the United States.

It is my purpose here today to urge you to weigh carefully any proposal to amend the U.S. Constitution especially one impacting on the First Amendment.

In Texas v. Johnson, the Supreme Court threw out a conviction based on flag burning because the act constituted "symbolic speech" protected by the First Amendment. The Court majority found it impossible to differentiate the flag from other symbols in the eye of the First Amendment. According to Justice Brennan, picking out what to

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protect would require government officials "to consult our own political preferences, and impose them on the citizenry, in the very way the First Amendment forbids us to do." When the case was argued before the Court, Justice Scalia suggested that if the flag were exempted from the First Amendment, similar protection might even be sought for the state flower. Whatever else may be said about the proposed amendment, one thing is clear: the concerns of both the majority and the minority over whether or not to exempt the flag from the coverage of the First Amendment would be rendered moot and irrelevant by the adoption of an amendment exempting flag desecration from the protection of the First Amendment. Government officials would not be called upon to determine whether the flag is a unique symbol deserving special protection. By the passage of such an amendment, such vagaries and uncertainties would be resolved. This does not, however, respond to the concerns expressed regarding the impact on our values. Does the nation which teaches the world that tolerance of dissent is the keystone of democracy wish to send a message that says you can make an exception for speech which offends the majority?

Indeed thinking back to my law school days , I remember an old Latin phrase applicable to statutory interpretation: "Expressio unius, exclusio alterius." In essence it says that the description of one single item in a statute which provides special treatment as to that item, automatically excludes all other items of a similar nature from that special treatment. Put in other terms it suggests that if a legislative body had intended there to be other items treated similarly to the item named, they would have named them in the legislation as well. Applied to the Amendment in question, it might well be that excluding flag desecration from the First Amendment, might have the effect of fortifying the protection afforded to other forms of symbolic expression.

Beyond this issue lie other significant concerns with the proposed amendment. The Constitution has been described as the "glue" which binds our society together. It should not be amended without a strong reason. More than 5.000 other proposed amendments have failed to secure approval, while only 26 have passed. Of the 26, the first 10 - the Bill of Rights, were adopted at the very beginning of our history. Two others, establishing and repealing prohibition, cancelled each other out. Do either the needs of American society or the feelings of a majority of the American people provide sufficiently compelling arguments for the adoption of an Amendment. As to the needs of our society, you must make a careful judgement of the importance of the subject matter and its impact on our posterity. As to the feelings of the American people, while polls indicate that support for the amendment is strong, it is questionable as to whether enough people feel strongly enough about the subject to provide an affirmative answer. Moreover, it is even more difficult to ascertain whether supporters of an amendment will be able to maintain the level of support through a long and difficult amendment process. Our forefathers in writing the Constitution were wise enough to establish a process which would require more than a temporary surge of public support. Assuming the proposed amendment secures the support of two-thirds of both Houses of Congress, its proponents will be sorely tested to secure the support of three-quarters of the Legislatures of the several states.

Finally, real concern has been expressed about potential vagaries in the term "desecration" used in the Amendment. Would the display of a flag on the seat of a pair of pants constitute desecration? What about the wearing of a flag scarf in the manner of the First Lady, Mrs. Bush? Would it be necessary to engage in a painstaking analysis of the intent of the wearer? In that regard would the use of the flag be "off limits" as a symbol of peaceful protest, available only as a symbol of veneration? This is a difficult question with which this Committee and the nation as a whole must wrestle.

Proponents of the Amendment feel that the flag is the unique symbol of all that we represent as a free society. They disagree with the Supreme Court majority which stated that it is impossible to draw a distinction between the flag and other symbols revered by Americans. The passage of an amendment exempting flag desecration from the First Amendment would, by definition set the flag apart as a symbol. While one could argue that the Liberty Bell, or the Constitution, or certain religious symbols should be accorded similar respect, the passage of the proposed amendment would make a clear line of demarcation probably agreeable to a majority of the amendment's supporters. Would it serve as a precedent for making future exceptions to the First Amendment? That is yet another question which you must weigh?

If from my testimony you have not been able to determine whether or not I support passage of the Amendment I am pleased. It has been my clear purpose not to urge either adoption or rejection, but simply to summarize in direct terms the strongest arguments on each side. The National Constitution Center, which I have the pleasure to represent does not engage in advocacy, but in education. Given the time, we would have presented you with testimony from distinguished advocates on both sides of the issue. Instead because of the limited time available, the responsibility to provide balanced testimony has been mine alone. I thank you for your interest and the opportunity to be heard.

The **Chairman**. Again, we will try to work out another day for Professor McDonald to appear.

Again, thank you all, particularly the press, for putting up with this room.

The hearing is adjourned.

[Whereupon, at 12:32 p.m., the committee was adjourned.]

[Written statement and article of Professor McDonald follow:]

THE UNIVERSITY OF ALABAMA
DEPARTMENT OF HISTORY

Senate Judiciary Committee:

This was my prepared statement for testimony before the committee scheduled for August 14. Unfortunately a delay at the airport in Tuscaloosa caused me to miss connections in Atlanta and made it impossible for me to get to Philadelphia in time.

Forrest McDonald

Forrest McDonald

202 TEN HOOR / (205) 348-7100 / BOX 870212 / TUSCALOOSA, ALABAMA 35487-0212

Testimony of Forrest McDonald

August 14, 1989

To overturn the Supreme Court's decision in Texas v. Johnson by a constitutional amendment would in no way be a departure from American tradition. Indeed, nearly a third of the amendments (5 out of 16) that have been adopted since the Bill of Rights were framed to overrule specific Court decisions, and hundreds of others for the same purpose have been proposed unsuccessfully. Amendment is the appropriate and in fact only means whereby the people can remind the Court that they, not it, are the sovereign authority in America.

The practice began at the very beginning, with the Court's first major decision. In the 1793 case of Chisholm v. Georgia, two South Carolinians sued the state of Georgia on behalf of a British subject, and the Court ruled in favor of the plaintiffs. An enormous popular outcry ensued, and an amendment was promptly introduced to deprive the federal courts of jurisdiction in suits brought against a state by a foreigner or a citizen of another state. The proposal was passed by the necessary two-thirds majority of Congress in 1794 and ratified as the Eleventh Amendment four years later.

As if insufficiently chastened by that experience, the Supreme Court in 1803 handed down its celebrated decision in Marbury v. Madison, in which for the first time it declared a congressional enactment unconstitutional. Though the case is conventionally cited as having established the principle of judicial review, it did not at the time establish much of anything except that the justices had best watch their steps.

President Jefferson was infuriated and called for the popular election of justices who would serve limited terms. The members of his party in

Congress sought instead to follow an inappropriate procedure, namely to purge the bench through the impeachment process. When that failed, Virginia Congressman John Randolph proposed a constitutional amendment making federal judges removable by the president on application of a simple majority of both houses of Congress. That failed of passage, as did upwards of 30 similar amendments, but the Supreme Court got the message: It did not venture to strike down another act of Congress for more than half a century.

The Court did, during the long tenure of Chief Justice John Marshall, strike down a number of state laws, the states being less formidable adversaries than Congress. These decisions elicited repeated proposals to alter the Constitution, which is one of the many reasons that 1300 amendments were introduced in Congress during the Constitution's first hundred years. One of the more interesting came from President Andrew Jackson. Angered by a number of Marshall's decisions and believing (as Jefferson had) that the presidential veto was a more proper instrument for defending the Constitution than the Court was, Jackson called for an amendment that would establish two Supreme Courts--one for states east of the Appalachians, one for those to the west.

It was under Marshall's successor, Jackson-appointee Roger Brooke Taney, that the Court again declared an act of Congress unconstitutional. This was in the infamous Dred Scott decision (1857), which held, among other things, that blacks were not and could never become citizens of the United States, even if they were free. Outraged northerners were impotent to do anything about the decision, for there were too many southern states to hope for a constitutional amendment; but the southern states soon committed political suicide by seceding from the Union. When the Civil War was over, triumphant northern radicals pushed the civil rights amendments through Congress and the states; and the first sentence of the Fourteenth Amendment explicitly overruled the Dred Scott decision.

The next amendment adopted to overturn a Supreme Court decision was the Sixteenth. In 1895 the court ruled (in Pollack v. Farmers' Loan and Trust) that Congress had no power to levy taxes on incomes. Almost immediately an amendment authorizing income taxes was introduced but defeated. Thirty-three subsequent efforts failed, until the proposal cleared Congress in 1909 and was ratified four years later. It is to be observed that the income tax amendment also struck at the Bill of Rights, for it effectively repealed the "taking clause" of the Fifth Amendment--"nor shall private property be taken for public use, without just compensation."

The other two amendments that reversed Supreme Court decisions were the Nineteenth, which overturned the ruling in Minor v. Happersett and gave females the right to vote; and the Twenty-Fourth, which outlawed poll taxes as a requirement for voting, after the Court had ruled (in Breedlove v. Suttles) that poll taxes were constitutional even though they were "patently a device for disfranchising Negroes."

Permit me to conclude by making three brief points, in ascending order of importance. First, it has been suggested that the flag-burning decision could be overturned by a carefully drawn statute. That approach has been tried and found wanting. In 1917 (in Hammer v. Dagenhart) the Court declared unconstitutional a federal act prohibiting the shipment in interstate commerce of products made with child labor. Struck by the reasoning and the 5 to 4 vote, Congress passed a law taxing such products instead; the Court saw through the ruse and in 1922 (in Bailey v. Drexel Furniture Company) struck down the substitute. The Court would almost certainly do the same with a statutory remedy for Texas v. Johnson.

Second, I believe that an amendment would serve as a salutary warning to the Court, that it must follow the dictates of common sense, lest it forfeit the popular respect that is essential to its continued viability. Let me quote here from one of the greatest of the Founding Fathers, John Dickinson of Delaware and Pennsylvania. The Constitution, he pointed out, is written "in the most clear, strong, positive, unequivocal expressions, of which our language is capable. Magna charta, or any other law, never contained clauses more decisive and emphatic. While the people of these states have sense, they will understand them; and while they have spirit, they will make them to be observed." A flag-burning amendment would be an immensely popular and essentially quite harmless way of admonishing the Court that We the People intend to make the plain language of the Constitution to be observed.

Finally, I suggest that the amendment to be proposed should be so phrased as to extend more broadly than the matter of desecration of the flag. The Court's doctrine of symbolic speech, on which the flag-burning decision was based, is a pernicious one; it is bad law because it is capricious and arbitrary. In the Johnson decision the Court declared that symbolic speech would not extend, for example, to painting swastikas on the Washington Monument. But what about painting swastikas on a synagogue, or burning crosses in front of an Afro-American Baptist Church? By twisting the language of the First Amendment to include action under "freedom of speech," the Court has placed all First Amendment rights on a slippery footing. I should therefore humbly suggest that the language of the amendment should read roughly as follows:

Forrest McDonald--5

"Congress and each of the states shall have power to enact and enforce laws prohibiting the desecration, mutilation, or destruction of any public building or monument, or of any national or religious symbol."

WALL STREET JOURNAL

Cleaning Up the Justices' Messes

By Forrest McDonald

Of all the arguments that have been advanced for and against a flag-burning amendment, the most persuasive, in my opinion, is one offered by Patrick Buchanan and William F. Buckley. Both columnists have suggested that such an amendment should be adopted as a means of telling the Supreme Court it has gone too far.

Their proposal has been denounced by civil libertarians as being at once frivolous and a grave departure from the American Way, but in fact court-bashing by amendment is a hallowed tradition in America, almost as old as the court itself. Indeed, one-fourth of all the amendments that have been adopted since the Bill of Rights were framed to overturn specific Supreme Court decisions, and hundreds of others for the same end have been proposed unsuccessfully.

Popular Outcry

The game began at the beginning, with the court's very first major decision. In the 1793 case of *Chisholm v. Georgia*, two South Carolinians sued the state of Georgia on behalf of a British subject, and the court ruled in favor of the plaintiffs. Amid an enormous popular outcry, an amendment was introduced to deprive the federal courts of jurisdiction in suits brought against a state by a foreigner or a citizen of another state. The proposal was passed by the necessary two-thirds majority of Congress in 1794 and ratified as the Eleventh Amendment four years later.

As if insufficiently chastened by that experience, the Supreme Court in 1803 handed down its celebrated decision in *Marbury v. Madison*, in which for the first time it declared a congressional enactment unconstitutional. Though the case is conventionally cited as having established the principle of judicial review, it did not at the time establish much of anything except that the justices had best watch their steps.

President Jefferson was infuriated and called for the popular election of justices who would serve limited terms. The members of his party in Congress had what they thought was a better idea, namely to purge the bench by the impeachment process. They did impeach Justice Samuel Chase but failed to obtain a conviction in the Senate, whereupon Virginia Rep. John Randolph, who had managed the prosecution, proposed a constitutional amendment making federal judges removable by the president on application of a simple majority of both houses of Congress. That failed passage, as did upwards of 30 similar amendments, but the Supreme Court got the message: It did not venture to strike down another act of Congress for more than half a century.

The court did, during the long tenure of Chief Justice John Marshall (1801-1835), strike down a number of state laws, the states being less formidable adversaries than Congress. Though the states generally tended to ignore the court's orders, the decisions elicited repeated proposals to alter the Constitution. That was among the many reasons that 1,300 amendments were introduced in Congress during the Constitution's first hundred years. One of the more interesting came from President Andrew Jackson. Angered by the tenor of Marshall's rulings, and believing (as Jefferson had) that the presidential veto, not court decisions, was the proper instrument for defending the Constitution, he called for de-fanging the jurists by establishing two Supreme Courts—one for the states east of the Appalachians, one for those to the west.

It was under Marshall's successor, Jackson-appointee Roger Brooke Taney, that the court again dared to declare an act of Congress unconstitutional. This was the infamous Dred Scott decision (1857), which held, among other things, that blacks were not and never could become citizens of the U.S., even if they were free. Most Southerners were jubilant, most Northerners outraged. Abraham Lincoln spoke for the rank and file of the nascent Republican Party when he voiced the hope that the ruling might be reversed, inasmuch as it had been decided by a five-to-four vote. No one considered trying to overturn it by amendment, however, for the southern states had enough votes to block such a maneuver.

> *One-fourth of all the amendments that have been adopted since the Bill of Rights were framed to overturn specific Supreme Court decisions, and hundreds of others for the same end have been proposed unsuccessfully.*

But the South was soon to secede. After the Civil War triumphant northern radicals could and did force civil rights amendments through Congress and the states, and the first sentence of the Fourteenth Amendment explicitly overruled the Dred Scott decision.

The next amendment adopted to overturn a Supreme Court decision was the Sixteenth. In 1895, though it had previously upheld the constitutionality of a federal income tax levied during the Civil War, the court ruled in *Pollock v. Farmers' Loan and Trust* that such taxes were unconstitutional. Almost immediately an amendment authorizing income taxes was introduced, only to be defeated. Thirty-three subsequent efforts failed, until finally, in 1909, the proposal cleared Congress. Four years later it had been ratified by the requisite three-quarters of the states.

On several occasions the mere threat of amendment has stimulated the court to rethink its direction. During and shortly after World War I, the court struck down a pair of congressional enactments designed to prevent the exploitation of the labor of children. More than 50 separate amendments were introduced to grant Congress the power to regulate or prohibit child labor; in 1924 an amendment for that purpose passed both houses. Twenty-eight states had ratified when, in the late 1930s, the Supreme Court made the amendment irrelevant by reversing its stand.

A similar fate befell the court's innovations in the field of foreign relations. In 1920 it decreed that treaties need not be constitutional and could, in fact, override the Constitution. A decade and a half later it declared that executive agreements had the constitutional force of treaties. This meant that the president could bargain away the rights of Americans simply by agreement with another head of state.

Franklin Roosevelt did precisely that, turning over to Stalin the assets of Russian emigres who had become U.S. citizens; the court approved the action. After the war, the court went so far as to invalidate a California law on the ground that it violated Article 55 of the UN charter. In response, Sen. John Bricker of Ohio introduced the Bricker Amendment, which would effectively have annulled all these rulings. The amendment failed in Congress by one vote; but the call was close enough that the court found it prudent to stop hearing cases on foreign relations and direct its attention elsewhere.

Upheld Poll Tax

The most recent constitutional override of a decision of the Supreme Court came as something of an anti-climax to many years of politicking. Back in 1937, in the case of *Breedlove v. Suttles*, the court upheld a poll tax, despite arguments that it was "patently a device of disfranchising Negroes," in violation of the Fifteenth Amendment. Bills and amendments to outlaw the poll tax were introduced in every session of Congress for the next 25 years. Then the Twenty-fourth amendment was passed by Congress and was ratified in 1964. By that time, however, only two states were actually affected, since all the others had already abolished poll taxes.

Now we come to the flap over the flag. Whatever the substantive merits of the proposal to remind the court once again who is boss, it cannot be said that to do so would be un-American. It is as American as mom, apple pie, and—well, the flag.

Mr. McDonald is a professor of history at the University of Alabama.

MEASURES TO PROTECT THE PHYSICAL INTEGRITY OF THE AMERICAN FLAG

WEDNESDAY, SEPTEMBER 13, 1989

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m., in Room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden (chairman of the committee) presiding.

Also present: Senators Leahy, Simon, Thurmond, Specter, Hatch, Simpson, and Grassley.

OPENING STATEMENT OF SENATOR BIDEN

The Chairman. The hearing will please come to order.

The Senate Judiciary Committee convenes this morning to resume our hearings on the issue of what, if anything, should be done to respond to the Supreme Court's decision in *Texas* v. *Johnson*, the so-called flag burning decision.

We now know, of course, what the House of Representatives believes should be done in response to the *Johnson* case. By a substantial margin of 380 to 38, the House expressed strong support for a statutory route, although I do understand they at some point may also vote on a constitutional approach.

This vote apparently is in response to some of the testimony at the hearings and, in response to that testimony, the House bill adds a couple of provisions to the bill that I introduced here some months ago. I am pleased that the full House has acted and I commend the House Judiciary Committee, in particular, for its careful and thoughtful consideration.

This committee has had two hearings thus far on the issue, and I think my colleague would agree that they have truly been educational and productive. Through a process that I hope has been thorough and fair, all points of view have been represented, ranging from those who support the statute I have introduced and others similar to it, the statute introduced by Senators Roth and Cohen, and those who strongly support the constitutional amendment that has been introduced by our two distinguished colleagues and the ranking member of this Committee, and to those who support nothing being done.

That option, the third option, is what Judge Lewis Pollack described at our last hearing as "the do nothing option." Speaking of Judge Pollack, I would urge my colleagues to review with great care the transcript from our last hearing, held on August 14, in Philadelphia.

We went to Philadelphia at the request of the Senate leadership, because they felt that it would be a particularly appropriate spot, as we looked at, studied, and heard testimony about the serious and solemn undertaking of amending the Constitution.

We heard some excellent testimony and, since many members were not able to attend, I urge them to review that testimony as we begin to move toward a final consideration of a statute and constitutional amendment, as proposed by my colleagues and President Bush.

It is with particular pleasure and with great honor that we open today's hearings with two very gifted witnesses and friends of the committee, as well as the testimony from a number of significant veterans organizations, representing the tens of millions of veterans in this country, as well as the third panel, some individual veterans representing not the official organizations, but their views.

In each case, we have not only sought to seek the opinion of all the established veterans' organizations, but to make sure that our witness list, as we have in the past, is balanced, those who want to speak for the constitutional amendment, against it, for the statute, against it, have their views heard.

Today we hear, as I said, from the veterans groups of this great Nation, from those who landed at Normandy, to those who battled in the jungles of Vietnam. For you who put your life and limb at risk to protect your countrymen and for your countless comrades in arms who have made the supreme sacrifice so that we could remain the greatest democracy on earth, the flag, no doubt, has a meaning that transcends even that for most Americans.

I am most pleased that we have an opportunity to hear from these groups, and we will hear also from individuals who have, as I said earlier, who have their own personal views.

I would ask unanimous consent that, in the interest of time and to accommodate my colleagues, that the remainder of my statement be placed in the record.

[The statement of Senator Biden follows:]

Opening Statement
Flag Hearing

Senator Joseph R. Biden, Jr.
Wednesday, September 13, 1989
Senate Caucus Room

The Senate Judiciary Committee convenes this morning to resume our hearings on the issue of what, if anything, we should do to respond to the Supreme Court's decision in Texas v. Johnson.

We now know, of course, what the House of Representatives believes should be done in response to the Johnson case. By an overwhelming margin of 380 to 38 yesterday, the House expressed its strong support for the statutory route. The House added a couple of provisions to the bill I introduced here, in response to some issues raised during their hearings. I am pleased that the full House has acted, and I commend the House Judiciary Committee in particular for its careful and thoughtful work.

This committee has had two hearings thus far on this issue, and I think my colleagues would agree that they've truly been educational and productive; thorough and fair. All points of view have been represented -- ranging from those who support the statute I've introduced with Senator Roth, Senator Cohen and some 30 of our colleagues; those who support the President's proposed constitutional amendment; and those who support a third option -- what Judge Louis Pollak described at our last hearing as the "do-nothing" option.

Speaking of Judge Pollak, I would urge my colleagues to review with great care the transcript from our last hearing, held on August 14th in Philadelphia. We went to Philadelphia at the request of the Senate leadership because they felt that it would be a particularly appropriate spot as we looked at, studied and heard testimony about the serious and solemn undertaking of amending the Constitution. We heard some excellent testimony, and since many members were not able to attend, I urge them to review that testimony as we begin to move toward the final consideration of the statute and the constitutional amendment proposed by President Bush.

It's with particular pleasure and with great honor that I open today's hearing, given the witnesses who will be testifying.

Today we hear from the veterans of this great nation -- from those who landed at Normandy to those who battled in the jungles of Vietnam. For you -- who put your life and limb at risk to protect your countrymen -- and for your countless comrades-in-arms who made the supreme sacrifice so that we could remain the greatest democracy on this earth -- the flag no doubt has meaning all of its own.

I'm most pleased that we have this opportunity to hear from our nation's veterans and find out what they think on this important issue. Interestingly, it appears from the written statements we've received that there's no consensus among you -and among the millions of veterans who you so ably represent -- on what we should do to respond to the Texas v. Johnson decision.

We'll hear today, for example, from the American Legion, who stand firmly behind the President's proposed constitutional amendment, as expressed in a resolution adopted at last week's convention.

And yet the Vietnam Veterans of America stand equally firm in their beliefs -- having issued a resounding call at their convention in August for Congress to enact precisely the statute that I've introduced. What's more, the Vietnam Veterans have expressed profound concern about the impact of the proposed constitutional amendment on our fundamental rights and liberties.

We'll also hear today from the Paralyzed Veterans of America, who believe that an amendment to the Constitution should be a matter of last resort and that the statutory route I've proposed should be tried first.

And then there are veterans such as James Warner, who -- as he will relate to us this morning -- served this nation in Vietnam and was held for five and one-half years in a North Vietnamese prisoner-of-war camp. Mr. Warner opposes both the statute and the constitutional amendment because in his view, the government does not have the "moral authority" to impose its will on this subject.

Perhaps the different views we'll hear today reflect the sentiment not just of America's veterans but the sentiment of all our citizens as well. For while we all share a love for the flag and an appreciation of the common bond with our neighbor that it symbolizes, we're not all agreed on how we go about protecting that unique symbol of our community.

Today's hearing continues this commmittee's effort to explore that issue, and I look forward to what I know will be enlightening and informative testimony.

The **Chairman**. Let me, before I turn over to the ranking member, Senator Thurmond, remind my colleagues on the committee that today's hearing is the second to the last in a series that the Senate Judiciary Committee, at the behest of the full Senate, agreed to hold, so that we will be prepared to report in a timely fashion to the Senate our views on both an amendment and on a constitutional approach, both of which we have agreed to, as the distinguished Republican leader is before us knows, we have agreed to vote on both of them in the month of October.

I yield to my colleague from South Carolina, Senator Thurmond.

OPENING STATEMENT OF SENATOR THURMOND

Senator **Thurmond**. Thank you very much, Mr. Chairman.

We are very fortunate this morning to have our able Republican leader here, Senator Dole. Senator Dole was among the first to appreciate what happened when that decision was handed down, and he has been very active since then to try to correct it.

We are also glad to have Senator Dixon here, a very prominent member of the Senate, and we appreciate his good work on the flag amendment and on the Armed Services Committee.

I want to say, too, that we are very honored to have the different veterans' representatives here today. If anyone understands the flag and what it means to this country, that it stands for freedom and justice and opportunity, it is the veterans of this country. We are so glad to have their representatives here today.

Mr. Chairman, today we begin our third hearing on a proposed constitutional amendment and legislation designed to prohibit the physical desecration of the American flag.

We are fortunate to have testify two of our very distinguished colleagues in the Senate, Senators Dole and Dixon, with whom I joined, along with others, in introducing the President's proposed constitutional amendment.

Up until today's hearing, we have primarily focused on the most effective and appropriate course for overturning the Johnson decision, either by statute or a constitutional amendment. An earlier resolution expressing disapproval of the Johnson decision passed the Senate by a vote of 97 to 3. There can be little argument that the United States would like to alter this overreaching Supreme Court decision. We will continue our debate and soon consider on the Senate floor both measures to address this decision.

Now we have an opportunity to hear from the veterans' groups who can ably articulate the symbolism behind our flag and how it is viewed by those who have worn the uniform to protect our precious freedoms. The witnesses from these groups represent men and women who have followed the American flag into battle and looked upon it as an inspiration as they fought to preserve a democratic way of life which has endured for over 200 years.

I look forward to hearing from our colleagues and these patriotic representatives of American veterans all across our great Nation.

I want to say this, that I will support the statutory approach as introduced by my distinguished colleague, the chairman of this committee, Senator Biden. I also will support the constitutional amendment. In fact, I was the first author, I believe, of a constitutional amendment which was introduced to overturn the *Johnson* decision.

The statute might get results. The constitutional amendment will definitely get results, so I feel we cannot just rely on the statute. I have no objection and think we ought to pass both. At the same time, I feel we must pass the constitutional amendment, because that will certainly guarantee results.

Again, Mr. Chairman, I thank you for your courtesy.

The **CHAIRMAN**. Thank you.

We will now be delighted to hear from the distinguished Republican leader and our distinguished colleague from Illinois, Senator Dixon, in any order that they would like to proceed.

PANEL CONSISTING OF HON. ROBERT DOLE, A U.S. SENATOR FROM THE STATE OF KANSAS; AND HON. ALAN J. DIXON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator **DOLE**. Thank you, Mr. Chairman, and thank you, Senator Thurmond and other members who are here this morning. I know we have a number of very important witnesses following myself and Senator Dixon, and I would ask that my statement be made a part of the record, and I will try to summarize that.

The **CHAIRMAN**. Without objection, your entire statement will be made a part of the record.

STATEMENT OF HON. ROBERT DOLE, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator **DOLE**. First, I would thank the Committee for having the hearings, and I know that in the Senate we are going to have an opportunity to vote on both the statute and the constitutional amendment.

When I got home last night, I turned on C-Span and listened to some of the debate in the House on the statutory approach, very compelling on both sides. As the chairman has pointed out, it was a fairly lopsided vote, so I think one reason for that is that some members thought there might not be an opportunity to vote on the amendment. In any event, they will have that opportunity now in the House.

I would just make the point that Senator Dixon and I, one Republican and one Democrat, we see it one way and members of this committee may see it another way. We think, as Senator Thurmond just pointed out, that one certain approach is a constitutional amendment. Our proposal is very brief. It just says the Congress and the States shall have the power to prevent the physical desecration of the flag of the United States.

All of us are familiar with the Supreme Court's recent decision in *Texas* v. *Johnson*, the now famous flag-burning case last June. And after hearing about it and after reading the decision, I was puzzled and disappointed and, I must say, read the decision and thought the arguments or the statements by some of the Justices were very persuasive, but I could not quite put it all together.

While it is illegal to destroy U.S. currency, while it is illegal to deface your own mailbox, while it is illegal in many States to rip the warning label off your bedroom mattress, a majority of the Supreme Court said that the flag of our Nation could be burned, mutilated, defaced, all under the guise of something called "constitutionally protected symbolic speech."

I soon found out that I was not alone in my feelings of disappointment and anger. The day after the decision was handed down, the Senate, by a vote of 97 to 3, passed a resolution expressing its disapproval of the Supreme Court's ruling.

According to a Gallup poll conducted this August, more than 60 percent of all Americans believe that the Supreme Court's decision was a mistake, a big mistake. So, what we have tried to do, in a bipartisan way, with I think 53 of us as cosponsors, is try to come up with some approach that we think would solve the problem.

Before introducing the amendment, we studied numerous options, we have consulted with the very best constitutional scholars—I am not one—conservative and liberal, in developing the amendment that will suitably protect the integrity of our flag, without impinging upon our cherished first amendment freedoms.

As President Bush remarked in a ceremony before the Iwo Jima Memorial, the final product of our efforts is starkly simple and straightforward. It gives to Congress and the States the constitutional and completely discretionary power to prohibit the physical desecration of Old Glory. Mr. Chairman, the flag amendment does nothing more and nothing less.

Well, why do I and so many other Americans feel so strongly about an amendment? Why do we feel so strongly about the need to reverse the Supreme Court's decision, to say no to those who would desecrate the flag and then seek protection by conveniently wrapping themselves around the first amendment or at least the first amendment as interpreted by five Justices in the *Johnson* majority?

The answer to these questions could not be found in a textbook or a treatise on constitutional law. It will be found in the emotions of the heart, emotions deeper rooted in real life experiences of millions of Americans, and later on this morning you will hear from a young man from Kansas who I read about in the Hutchinson News, named Gary Freeman, who went out on his own—it was not very difficult—he and his wife, just a hard-working fellow in Kansas, and picked up 25 signatures in that area for a constitutional amendment, and he will tell you how real people feel about this issue. He is a Vietnam veteran, a member of the American Legion, and probably other veterans' groups, and he feels strongly about it. I think we do not hear from those people very often and I am very pleased that he was invited to be here this morning.

I am not here to argue anybody's integrity or anybody's patriotism. I think we have a difference of opinion. In fact, I support the chairman's efforts to attach the statute to the child care bill. It seemed to me at the time that was something we could do. I am not certain that will ever be acted on, at least it will be some time, but the other statute will probably be acted on earlier.

But the flag is the one symbol, the one symbol that unites us as a Nation. It is the one symbol that transcends the diversity of America and brings us together as a people, a people with vastly different, but vastly rich cultural, religious, and social heritages. Even Justice Brennan recognized the unique symbolic power of the flag when, in the *Johnson* decision, he speaks of the flag's deservedly cherished place in our community, he also speaks of the flag's special role and of the feeling it inspires, and certainly he is correct. I think he has spoken for me and millions of other Americans, for it is precisely because of the flag's cherished place in our community, it is precisely because of the flag's special role, it is precisely because of the feelings that the flag inspires among Americans, that I believe our flag deserves constitutional protection.

I listened to some of the debate on C-Span, I have read about some of the testimony where Senator Dixon and I are going to take you down a slippery slope. I do not think it is a slipper slope at all. We are not trying to do away with any of our first amendment freedoms, we are not going to slide down to the slope's foundation, like someone on an Alpine course. I think these claims are exaggerated. It will not sound the death knell of the first amendment, the amendment will not prevent people like Gregory Johnson from continuing to speak out in all sorts of ways against their country, against their government and against their flag.

The Supreme Court has recognized that the freedoms guaranteed by the first amendment are not unlimited, they are not boundless. The laws of obscenity and defamation, for example, provides well-established exceptions to our first amendment rights.

We are all familiar with the fighting words exception, and even such staunch defenders of the first amendment as former Chief Justice Earl Warren and Justice Hugo Black, recognize that the first amendment does not prohibit the criminalization of flag desecration, that free speech is not a free license to desecrate the living symbol of our Nation.

So, I would just say in closing my testimony, what we are doing is following a right we have in the Constitution and that is to try to amend it. It is not an easy process, it has been tried thousands of times and there have only been 26 success stories.

But as Prof. Forrest McDonald indicated in his written testimony before this committee, amending the Constitution is also squarely in the American tradition. In fact, one-fourth of all the amendments adopted since the Bill of Rights were drafted to overturn specific Supreme Court decisions like *Texas* v. *Johnson*. For example, we would not have the Federal income tax—in a number of cases, perhaps that amendment was not such a good idea, after all, but it was brought about because it was overturning a Supreme Court decision.

But the framers of the Constitution intentionally provided a procedure and that is precisely what Senator Dixon and I and others who cosponsor our approach, and Senator Thurmond has an approach, with about 47 or 48 cosponsors—some are the same and some are different—is to make certain we do not have some frivolous amendment adopted or some meritless amendment adopted and is not made part of our Constitution.

So, this amendment, just as any other amendment, has to survive the process, we have got to have a three-fourths vote, we have got to have three-fourths of the States. But if it fails to receive the necessary votes here in Congress and the State legislatures, then sobeit, we have made our case, we have done the best we can, we have stated our point of view, and the process will work, in either event. I think it is going to work to the advantage, I think there will be a constitutional amendment.

So, my point here is simply this: The members of the Judiciary Committee and all of us in Congress should not fear a constitutional amendment. We should not fear that we are doing something extraordinary. Amending the Constitution is a solemn act, certainly, but it is also a very American act.

Again, I think, rather than go the statutory approach, which we are familiar with and which we have had hearings on, on which we have different views, as Justice Bork has indicated that it is not constitutional, others may have a different view, some thing we should do nothing, as the Chairman pointed out, the so-called "do nothing approach," but I would just conclude from the piece entitled "The Banner Yet Waves," written by the editors of Readers' Digest, which appeared in Monday's edition of The Washington Post, these words are far better than any words that I can offer you today, and I quote:

> While Americans know that behind this rectangle of cloth there is blood and great sacrifice, there is also behind it an idea that redefined once and forever the meaning of hope and freedom. Lawyers and justices may debate the act of flag-burning as freedom of expression. But a larger point is inarguable: When someone dishonors, desecrates the banner, it deeply offends, because the flag says all that needs to be said about things worth preserving, loving, defending, and dying for.

Mr. Chairman, that is what this debate is all about, that is what these hearings are all about, and that is why I support a constitutional amendment.

I would point out that also in this month's VFW Magazine, the Veterans of Foreign Wars Magazine, an article which I would ask be included in the record, if the commander does not ask it to be included in the record, entitled "Constitutional Amendment: The Only Solution," and I think it makes a good case, too.

The CHAIRMAN. Without objection, it will be placed in the record.

[The article referred to follows:]

Constitutional Amendment

The Only Solution

National Legislative Director James Magill presented the VFW's position on the Flag before the House Subcommittee on Civil and Constitutional Rights. Portions of his testimony were adapted for this article.

After hearing the Supreme Court's June decision decreeing Flag desecration an expression of free speech, the VFW's reaction shifted from disbelief to shock to outrage.

Bear in mind that VFW membership eligibility is based not only on overseas service but duty in a combat zone as well.

While serving overseas, the Flag was the sole symbol of and link to home. For this reason, VFW members today still hold special allegiance to the Flag.

Nowhere was this allegiance more evident than during the past July 4th celebrations. VFW Posts across the nation rallied to proclaim and demonstrate their love and respect for the Flag.

The intensity of this activity was not kindled by a newfound respect for the Flag, for that devotion has never diminished. Rather, it stemmed from the belief that the Flag is now subject to desecration with legal sanction. This notion is contrary to VFW members' convictions and sense of justice.

The Supreme Court decision has generated much debate. VFW believes the question that is foremost in the minds of its members and, for that matter most Americans, is how to best protect the Flag from desecration. And also how to achieve this in a timely manner.

"Although the legislative process is an alternative, I fear it would be a temporary solution. Patriotic U.S. citizens, especially war veterans, place great value on the country's national symbol and will not tolerate its desecration.

"Amending the Constitution as a means of upholding values dear to the American people is a well-established tradition. Far from being a threat to the Bill of Rights, the amendment process has proven its worth in numerous cases throughout our history. Surely, protection of the Flag is a worthwhile cause."

Commander-in-Chief Wally Hogan

Constitutional Amendment

Considering the Supreme Court's ruling, this can only be achieved, in our opinion, by a constitutional amendment. New legislation would only result in the Supreme Court upholding its decision in the case of Texas vs. Johnson.

VFW urges Congress to introduce a resolution calling for a constitutional amendment so the state ratification process can begin. VFW has already written letters to the 50 governors urging their prompt support.

Republican and Democratic Party chairmen have also been contacted, informing them of the organization's views and requesting they make public their positions on this issue.

While other alternatives have been suggested, a constitutional amendment would be the only certain method of reversing the Supreme Court's decision.

Mail received at National Headquarters indicates overwhelming membership support for a constitutional amendment to redress this injustice.

The manner in which citizens treat the country's national symbol reveals much about the value Americans place on a free and independent society. VFW members, indeed all of this nation's veterans, have made great sacrifices in defense of all fundamental American principles.

Freedom of expression is one of those principles. But this precious freedom can and should co-exist with a sense of reverence for the Flag and all it represents. ■

Senator DOLE. I thank the Chair and I thank the committee.

[The statement of Senator Dole follows:]

News from Senator

BOB DOLE

(R - Kansas) SH 141 Hart Building, Washington, D.C. 20510

FOR IMMEDIATE RELEASE
SEPTEMBER 13,1989

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TESTIMONY OF SENATOR BOB DOLE
HEARINGS BEFORE THE SENATE JUDICIARY COMMITTEE
THE FLAG AMENDMENT
SEPTEMBER 13, 1989

ALL OF US ARE PERHAPS TOO FAMILIAR WITH THE SUPREME COURT'S RECENT DECISION IN TEXAS VERSUS JOHNSON -- THE NOW FAMOUS "FLAG BURNING" CASE. LAST JUNE, AFTER HEARING ABOUT -- AND THEN READING -- THE DECISION, I WAS PUZZLED, DISAPPOINTED -- AND FRANKLY -- A BIT ANGRY. WHILE IT IS ILLEGAL TO DESTROY U.S. CURRENCY, WHILE IT IS ILLEGAL TO DEFACE YOUR OWN MAILBOX, WHILE IT IS ILLEGAL IN MANY STATES TO RIP THE WARRANTY LABEL OFF YOUR BEDROOM MATTRESS, A MAJORITY OF THE SUPREME COURT SAID THAT THE FLAG OF OUR NATION COULD BE BURNED, MUTILATED, DEFACED -- ALL UNDER THE GUISE OF SOMETHING CALLED CONSTITUTIONALLY-PROTECTED SYMBOLIC SPEECH.

I SOON FOUND OUT THAT I WAS NOT ALONE IN MY FEELINGS OF DISAPPOINTMENT AND ANGER. THE DAY AFTER THE DECISION WAS HANDED DOWN, THE SENATE -- BY A VOTE OF 97 TO 3 -- PASSED A RESOLUTION EXPRESSING ITS DISAPPROVAL OF THE SUPREME COURT'S RULING. AND ACCORDING TO A GALLUP POLL CONDUCTED THIS AUGUST, MORE THAN 60 PERCENT OF ALL AMERICANS BELIEVE THAT THE SUPREME COURT'S DECISION WAS A MISTAKE -- A BIG MISTAKE.

THE NEED FOR A CONSTITUTIONAL AMENDMENT

SENATOR DIXON AND I HAVE TRIED TO CORRECT THIS MISTAKE BY INTRODUCING THE CONSTITUTIONAL AMENDMENT THAT HAS BECOME THE SUBJECT OF THESE HEARINGS. BEFORE INTRODUCING THE AMENDMENT, WE STUDIED NUMEROUS OPTIONS. WE CONSULTED WITH THE VERY BEST CONSTITUTIONAL SCHOLARS -- CONSERVATIVE AND LIBERAL -- IN DEVELOPING AN AMENDMENT THAT WILL SUITABLY PROTECT THE INTEGRITY OF OUR FLAG WITHOUT IMPINGING UPON OUR CHERISHED FIRST AMENDMENT FREEDOMS. AND AS PRESIDENT BUSH REMARKED IN A CEREMONY BEFORE THE IWO JIMA MEMORIAL, THE FINAL PRODUCT OF OUR EFFORTS IS STARKLY SIMPLE AND STRAIGHTFORWARD: IT GIVES TO CONGRESS AND THE STATES THE CONSTITUTIONAL -- AND COMPLETELY DISCRETIONARY -- POWER TO PROHIBIT THE PHYSICAL DESECRATION OF OLD GLORY.

MR. CHAIRMAN, THE FLAG AMENDMENT DOES NOTHING MORE -- AND NOTHING LESS.

BY WHY DO I -- AND SO MANY OTHER AMERICANS -- FEEL SO STRONGLY ABOUT AN AMENDMENT? WHY DO WE FEEL SO STRONGLY ABOUT THE NEED TO REVERSE THE SUPREME COURT'S DECISION -- TO SAY "NO" TO THOSE WHO WOULD DESECRATE THE FLAG -- AND THEN SEEK PROTECTION BY CONVENIENTLY WRAPPING THEMSELVES AROUND THE FIRST AMENDMENT, OR AT LEAST THE FIRST AMENDMENT AS INTERPRETED BY THE FIVE JUSTICES IN THE JOHNSON MAJORITY?

THE ANSWER TO THESE QUESTIONS WILL NOT BE FOUND IN A TEXTBOOK OR IN A TREATISE ON CONSTITUTIONAL LAW. IT WILL BE FOUND IN THE EMOTIONS OF THE HEART -- EMOTIONS DEEPLY ROOTED IN THE REAL-LIFE EXPERIENCES OF MILLIONS OF AMERICANS.

(MORE)

THE SYMBOLIC POWER OF THE FLAG

NOW, THE MEMBERS OF THIS COMMITTEE DO *NOT* NEED ME TO TELL THEM ABOUT THE SYMBOLIC IMPORTANCE -- AND POWER -- OF THE FLAG. AND YOU DO *NOT* NEED ME TO TELL YOU HOW REVERED THE FLAG IS BY THE OVERWHELMING MAJORITY OF AMERICANS. JUST ASK YOUR CONSTITUTENTS.

THE FLAG IS THE ONE SYMBOL -- *THE ONE SYMBOL* -- THAT UNITES US AS A NATION. IT IS THE ONE SYMBOL THAT TRANSCENDS THE DIVERSITY OF AMERICA AND BRINGS US TOGETHER AS A PEOPLE -- A PEOPLE WITH VASTLY DIFFERENT -- BUT VASTLY RICH -- CULTURAL, RELIGIOUS, AND SOCIAL HERITAGES.

EVEN JUSTICE BRENNAN RECOGNIZED THE UNIQUE SYMBOLIC POWER OF THE FLAG WHEN -- IN THE *JOHNSON* DECISION -- HE SPEAKS OF THE "FLAG'S DESERVEDLY CHERISHED PLACE IN OUR COMMUNITY." HE ALSO SPEAKS OF THE "FLAG'S SPECIAL ROLE" AND OF THE "FEELINGS IT INSPIRES."

JUSTICE BRENNAN HAS SPOKEN FOR ME. FOR IT IS *PRECISELY* BECAUSE OF THE FLAG'S "CHERISHED PLACE IN OUR COMMUNITY," IT IS *PRECISELY* BECAUSE OF THE "FLAG'S SPECIAL ROLE," IT IS *PRECISELY* BECAUSE OF THE FEELINGS THAT THE FLAG INSPIRES AMONG AMERICANS, THAT I BELIEVE THE FLAG -- OUR FLAG -- DESERVES CONSTITUTIONAL PROTECTION.

OUR PRECIOUS FIRST AMENDMENT FREEDOMS

SOME CRITICS -- MOSTLY LAWYERS AND LAW PROFESSORS -- LIKE TO TALK ABOUT "SLIPPERY SLOPES." THESE CRITICS CLAIM THAT THE AMENDMENT INTRODUCED BY SENATOR DIXON AND MYSELF IS A SLIPPERY SLOPE AND THAT -- IF PASSED -- ALL OF OUR CHERISHED FIRST AMENDMENT FREEDOMS WILL SOMEHOW SLIDE DOWN TO THE SLOPE'S FOUNDATION -- LIKE SOME SKIER ON AN ALPINE COURSE.

MR. CHAIRMAN, IN MY OPINION, THESE CLAIMS ARE GROSSLY EXAGGERATED. THE AMENDMENT WILL *NOT* SOUND THE DEATHKNELL OF THE FIRST AMENDMENT. AND THE AMENDMENT WILL *NOT* PREVENT PEOPLE LIKE GREGORY JOHNSON FROM CONTINUING TO SPEAK OUT -- IN ALL SORTS OF WAYS -- AGAINST THEIR COUNTRY, AGAINST THEIR GOVERNMENT, AND AGAINST THEIR FLAG.

THE SUPREME COURT ITSELF HAS RECOGNIZED THAT THE FREEDOMS GUARANTEED BY THE FIRST AMENDMENT ARE *NOT* UNLIMITED -- THAT THEY ARE *NOT* BOUNDLESS. THE LAW OF OBSCENITY AND DEFAMATION, FOR EXAMPLE, PROVIDES WELL-ESTABLISHED EXCEPTIONS TO OUR FIRST AMENDMENT RIGHTS. WE ARE ALL FAMILIAR WITH THE "FIGHTING WORDS" EXCEPTION. AND EVEN SUCH STAUNCH DEFENDERS OF THE FIRST AMENDMENT AS FORMER CHIEF JUSTICE EARL WARREN AND JUSTICE HUGO BLACK RECOGNIZED THAT THE FIRST AMENDMENT DOES *NOT* PROHIBIT THE CRIMINALIZATION OF FLAG DESECRATION -- THAT FREE SPEECH IS *NOT* A FREE LICENSE TO DESECRATE THE LIVING SYMBOL OF OUR NATION.

A CONSTITUTIONAL AMENDMENT: SQUARELY IN THE AMERICAN TRADITION

YOU KNOW, AMENDING THE CONSTITUTION IS SERIOUS BUSINESS. BUT AS PROFESSOR FORREST MACDONALD INDICATED IN HIS WRITTEN TESTIMONY BEFORE THIS COMMITTEE, AMENDING THE CONSTITUTION IS ALSO SQUARELY IN THE AMERICAN TRADITION. IN FACT, ONE-FOURTH OF ALL THE AMENDMENTS ADOPTED SINCE THE BILL OF RIGHTS WERE DRAFTED TO OVERTURN SPECIFIC SUPREME COURT DECISIONS LIKE *TEXAS VERSUS JOHNSON*. FOR EXAMPLE, WE WOULD *NOT* HAVE THE FEDERAL INCOME TAX TODAY WITHOUT THE 16TH AMENDMENT, RATIFIED BY CONGRESS AND THE STATES AT THE BEGINNING OF THIS CENTURY IN AN EFFORT TO OVERTURN THE *POLLACK VERSUS FARMERS LOAN AND TRUST* DECISION.

PERHAPS THIS AMENDMENT WAS *NOT* SUCH A GOOD IDEA AFTER ALL.

(MORE)

BUT FORTUNATELY, IN THEIR WISDOM, THE FRAMERS INTENTIONALLY MADE THE AMENDMENT PROCESS LONG AND DIFFICULT. THIS IS TO ENSURE THAT FRIVOLOUS -- OR MERITLESS -- AMENDMENTS ARE NOT MADE PART OF OUR CONSTITUTION. THE FLAG AMENDMENT WILL HAVE TO SURVIVE THIS PROCESS. IF THE AMERICAN PEOPLE DO NOT WANT THE FLAG AMENDMENT -- IF IT FAILS TO RECEIVE THE NECESSARY VOTES HERE IN CONGRESS OR IN THE STATE LEGISLATURES, THEN SO BE IT -- THE PROCESS WILL HAVE WORKED.

SO MY POINT HERE IS SIMPLY THIS: THE MEMBERS OF THE JUDICIARY COMMITTEE -- AND ALL OF US IN CONGRESS -- SHOULD NOT FEAR A CONSTITUTIONAL AMENDMENT. WE SHOULD NOT FEAR THAT WE ARE DOING SOMETHING EXTRAORDINARY. AMENDING THE CONSTITUTION IS A SOLEMN ACT -- CERTAINLY -- BUT, IT IS ALSO A VERY AMERICAN ACT.

THE STATUTORY APPROACH

I COMMEND THE EFFORT OF SENATOR BIDEN, THE CHAIRMAN OF THIS COMMITTEE, WHO HAS PROPOSED AN AMENDMENT NOT TO THE CONSTITUTION, BUT TO THE FEDERAL FLAG DESECRATION STATUTE. THIS IS CERTAINLY A SERIOUS EFFORT THAT DESERVES SERIOUS CONSIDERATION IN BOTH HOUSES OF CONGRESS.

BUT I HAVE COME TO THE CONCLUSION -- REGRETFULLY -- THAT A STATUTE, RATHER THAN A CONSTITUTIONAL AMENDMENT, WILL SIMPLY NOT DO THE TRICK -- THAT A STATUTE WILL SIMPLY NOT GUARANTEE THE FLAG'S SAFETY FROM PHYSICAL DESECRATION.

NOW, I WOULD BE THE FIRST ONE TO ADMIT THAT I AM NOT A CONSTITUTIONAL SCHOLAR. I AM A POLITICIAN -- AND I HAVE BEEN ONE FOR SOME TIME NOW. BUT LIKE MOST OTHERS IN CONGRESS, I KNOW WHEN TO ENLIST THE EXPERTISE OF OTHERS. AFTER ALL, ISN'T THAT WHAT THESE HEARINGS ARE ALL ABOUT?

SO WHAT ARE SOME OF THE EXPERTS SAYING. THE DEPARTMENT OF JUSTICE BELIEVES THAT THE CONSTITUTIONAL AMENDMENT APPROACH IS THE ONLY WAY TO CORRECT THE JOHNSON DECISION. PROFESSOR CHARLES FRIED OF HARVARD, FORMER SOLICITOR GENERAL IN THE REAGAN ADMINISTRATION, HAD ORIGINALLY PLANNED TO TESTIFY BEFORE THE HOUSE JUDICIARY COMMITTEE IN SUPPORT OF THE STATUTORY APPROACH, BUT HE LATER CHANGED HIS MIND IN LIGHT OF WHAT HE DESCRIBED AS THE JUSTICE DEPARTMENT'S "DEVASTATINGLY GOOD" TESTIMONY, CONCLUDING THAT A STATUTE JUST WON'T WORK. AND JUDGE ROBERT BORK IS ON RECORD AS SAYING THAT IF MARBURY VERSUS MADISON MEANS ANYTHING, THEN IT MEANS THAT CONGRESS CANNOT OVERTURN THE JOHNSON DECISION -- OR ANY SUPREME COURT DECISION, FOR THAT MATTER -- BY STATUTE.

EVEN PROFESSOR GEOFFREY STONE, WHO TESTIFIED BEFORE THE JUDICIARY COMMITTEE LAST AUGUST AND WHO OPPOSES A CONSTITUTIONAL AMENDMENT BECAUSE HE FEELS THAT FLAG-BURNING IS AN ISSUE OF "SECONDARY IMPORTANCE," ADMITS THAT THE STATUTE WOULD PROBABLY BE UNCONSTITUTIONAL IF IT WERE DESIGNED BY ITS SPONSORS TO CIRCUMVENT THE SUPREME COURT'S DECISION IN TEXAS VERSUS JOHNSON AND TO PROHIBIT THE USE -- THE DESECRATION -- OF THE AMERICAN FLAG FOR PURPOSES OF EXPRESSING A POLITICAL IDEA.

BUT, AFTER ALL, ISN'T THAT THE VERY PURPOSE OF THE STATUTE -- DESPITE THE FACT THAT IT IS DRAFTED TO BE "CONTENT NEUTRAL?" ISN'T IT THE PURPOSE OF THE STATUTE TO PRESERVE THE FLAG AS OUR SYMBOL OF NATIONAL UNITY -- TO PREVENT ANY DIMUNITION IN THE SYMBOLIC POWER OF THE FLAG THROUGH ITS MINDLESS DESECRATION -- TO OVERTURN THE TEXAS VERSUS JOHNSON DECISION, IN OTHER WORDS?

WITHOUT ANY RESERVATIONS OR HESITATION WHATSOEVER, I WILL STATE FOR THE RECORD THAT THIS IS THE VERY PURPOSE OF THE CONSTITUTIONAL AMENDMENT.

(MORE)

CONCLUSION

I WOULD LIKE TO CONCLUDE HERE WITH A FEW WORDS FROM A PIECE ENTITLED "THE BANNER YET WAVES," WRITTEN BY THE EDITORS OF READER'S DIGEST AND WHICH APPEARED IN MONDAY'S EDITION OF THE WASHINGTON POST. THESE WORDS ARE FAR BETTER THAN ANY WORDS THAT I CAN OFFER YOU TODAY.

I QUOTE:

> "WHILE AMERICANS KNOW THAT BEHIND THIS RECTANGLE OF CLOTH THERE IS BLOOD AND GREAT SACRIFICE, THERE IS ALSO BEHIND IT AN IDEA THAT REDEFINED ONCE AND FOREVER THE MEANING OF HOPE AND FREEDOM. LAWYERS AND JUSTICES MAY DEBATE THE ACT OF FLAG-BURNING AS FREEDOM OF EXPRESSION. BUT A LARGER POINT IS INARGUABLE: WHEN SOMEONE DISHONORS OR DESECRATES THE BANNER, IT DEEPLY OFFENDS, BECAUSE THE FLAG SAYS ALL THAT NEEDS TO BE SAID ABOUT THINGS WORTH PRESERVING, LOVING, DEFENDING, DYING FOR."

MR. CHAIRMAN, THAT'S WHAT THIS DEBATE IS ALL ABOUT. THAT'S WHAT THESE HEARINGS ARE ALL ABOUT. AND THAT'S WHY I SUPPORT A CONSTITUTIONAL AMENDMENT.

THANK YOU FOR YOUR KIND ATTENTION.

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The **Chairman**. Thank you, Senator.

Senator Dixon.

STATEMENT OF HON. ALAN J. DIXON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator **Dixon**. Mr. Chairman and members of the committee, thank you for the opportunity to be with you this morning.

Senate Joint Resolution 180, the proposed amendment to the Constitution prohibiting the desecration of the American flag, is a reasonable, necessary response to a vexing problem.

This amendment will not suppress free speech or cast a pall over the free expression of ideas in this land. It simply says that burning a flag does not constitute protected speech, just as we do not classify obscene or incendiary speech as protected speech.

As you know, the Supreme Court, in *Texas* v. *Johnson*, declared Texas' flag desecration law unconstitutional. I thoroughly disagree with that decision. I have read the decision very carefully and, frankly, I found the dissent more persuasive.

In his dissent, Mr. Justice Stevens of Illinois says that:

> Had he [Johnson] chose to spray paint—or perhaps convey with a motion picture projector—his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset.

He further wrote that:

> Sanctioning the public desecration of the flag will tarnish its value—both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it.

Clearly, the flag is an important national asset. I would argue that it is perhaps the most important one. Chief Justice Rehnquist, in his dissent, reminds us that freedom of speech is not an absolute right under the Constitution. The Chief Justice cites *Chaplinsky* v. *New Hampshire*, in which a unanimous Court held that:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem . . . it has been well observed that such utterances are no essential part of any exposition of ideas.

This is the heart, in my view, of this matter.

Gregory Johnson, standing outside the Dallas City Hall, took an American flag, poured kerosene on it, and burned it, and while it burned, he chanted, "America, the red, white and blue, we spit on you." Now, his speech, while offensive to some, and certainly to this Senator, was and should always be protected speech. The act of burning the American flag, I contend, was and is not protected speech. Of all the ways Gregory Johnson could have chosen to express his displeasure, he chose to desecrate the unifying symbol of a Nation.

The reason this amendment is required is that it is the most effective way to protect the physical integrity of the flag. I am also a cosponsor of the flag statute offered by the distinguished chairman. I congratulate him for the hard work he has put into the statutory approach, and I would be the first to say that, if the courts uphold it, a constitutional amendment becomes unnecessary. However, we cannot know with certainty what the Supreme Court will do if faced with this statute. I believe, therefore, that we should continue to push forward with the constitutional amendment.

Adding an amendment to our Constitution is deliberately designed to be very difficult. It will take a long time for this amendment to become part of our Constitution. Because of the time involved, it makes sense to me to go forward on both the statutory and constitutional amendment tracks. If the Court upholds the constitutionality of a flag desecration statute, there will be ample opportunity to stop the constitutional amendment. If, however, the Court eventually overturns the statute, we will have wasted considerable time by not starting to move forward with the constitutional amendment now.

I hope Senate bill 1338 will pass the Congress, because in the end, the Senator from Delaware and I share a common goal of preserving and protecting the flag. Our approaches may be somewhat different, but our intent is the same.

It is clear to me that the amendment before us would be an effective check on the abuse of our national symbol, while not undermining at all the principles of free speech. The flag is a unique symbol. No other symbol in our Nation's history holds a similar place in the minds of Americans. Because of its unique nature, I do not foresee the passage of this amendment as the beginning of further legislation prohibiting the desecration of other symbols in our culture such as the Presidential seal.

Justice Fortas, in *Street* v. *New York,* wrote that:

> The flag is a special kind of personality . . . a flag may be property, in a sense, but it is property burdened with peculiar obligations and restrictions. Certainly . . . these special conditions are not per se arbitrary or beyond governmental power under our Constitution.

Mr. Chairman, I appear before my colleagues today to urge adoption of this constitutional amendment. We should send this on to the States for ratification. For, as Justice Stevens stated in his dissent in *Texas* v. *Johnson:*

> If . . . the ideas of liberty and equality . . . are worth fighting for . . . it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

I thank the Chair and my colleagues.

[The statement of Senator Dixon follows:]

STATEMENT OF SENATOR ALAN J. DIXON
SUPPORT S.J. RES. 180
THE ANTI-DESECRATION AMENDMENT
SEPTEMBER 13, 1989

MR. CHAIRMAN, AND MEMBERS OF THE COMMITTEE, THANK YOU FOR THE OPPORTUNITY TO BE WITH YOU THIS MORNING.

SENATE JOINT RESOLUTION 180, THE PROPOSED AMENDMENT TO THE CONSTITUTION PROHIBITING THE DESECRATION OF THE AMERICAN FLAG, IS A REASONABLE, NECESSARY RESPONSE TO A VEXING PROBLEM.

THIS AMENDMENT WILL NOT SUPPRESS FREE SPEECH OR CAST A PALL OVER THE FREE EXPRESSION OF IDEAS IN THE LAND. IT SIMPLY SAYS THAT BURNING A FLAG DOES NOT CONSTITUTE PROTECTED SPEECH, JUST AS WE DO NOT CLASSIFY OBSCENE OR INCENDIARY SPEECH AS PROTECTED SPEECH.

AS YOU KNOW, THE SUPREME COURT, IN TEXAS V. JOHNSON, DECLARED TEXAS' FLAG DESECRATION LAW UNCONSTITUTIONAL. I THOROUGHLY DISAGREE WITH THAT DECISION! I HAVE READ THE DECISION VERY CAREFULLY, AND FOUND THE DISSENT MORE PERSUASIVE.

IN HIS DISSENT, MR. JUSTICE STEVENS STATES THAT "HAD HE (JOHNSON) CHOSEN TO SPRAY PAINT -- OR PERHAPS CONVEY WITH A MOTION PICTURE PROJECTOR -- HIS MESSAGE OF DISSATISFACTION ON THE FACADE OF THE LINCOLN MEMORIAL, THERE WOULD BE NO QUESTION ABOUT THE POWER OF THE GOVERNMENT TO PROHIBIT HIS MEANS OF EXPRESSION. THE PROHIBITION WOULD BE SUPPORTED BY THE LEGITIMATE INTEREST IN PRESERVING THE QUALITY OF AN IMPORTANT NATIONAL ASSET." HE FURTHER WROTE THAT "SANCTIONING THE PUBLIC DESECRATION OF THE

FLAG WILL TARNISH ITS VALUE -- BOTH FOR THOSE WHO CHERISH THE IDEAS FOR WHICH IT WAVES AND FOR THOSE WHO DESIRE TO DON THE ROBES OF MARTYRDOM BY BURNING IT.

CLEARLY, THE FLAG IS AN IMPORTANT NATIONAL ASSET. I WOULD ARGUE THAT IT IS PERHAPS THE MOST IMPORTANT ONE. CHIEF JUSTICE REHNQUIST IN HIS DISSENT REMINDS US THAT FREEDOM OF SPEECH IS NOT AN ABSOLUTE RIGHT UNDER THE CONSTITUTION. THE CHIEF JUSTICE CITES CHAPLINSKY V. NEW HAMPSHIRE, IN WHICH A UNANIMOUS COURT HELD THAT "THERE ARE CERTAIN WELL-DEFINED AND NARROWLY LIMITED CLASSES OF SPEECH, THE PREVENTION AND PUNISHMENT OF WHICH HAVE NEVER BEEN THOUGHT TO RAISE ANY CONSTITUTIONAL PROBLEM...IT HAS BEEN WELL OBSERVED THAT SUCH UTTERANCES ARE NO ESSENTIAL PART OF ANY EXPOSITION OF IDEAS."

THIS IS THE HEART OF THE MATTER.

GREGORY JOHNSON, STANDING OUTSIDE THE DALLAS CITY HALL, TOOK AN AMERICAN FLAG, POURED KEROSENE ON IT, AND BURNED IT. WHILE IT BURNED HE CHANTED, "AMERICA, THE RED, WHITE, AND BLUE, WE SPIT ON YOU." HIS SPEECH, WHILE OFFENSIVE TO SOME, WAS AND SHOULD ALWAYS BE PROTECTED SPEECH. THE ACT OF BURNING THE AMERICAN FLAG, I CONTEND, WAS AND IS NOT PROTECTED SPEECH. OF ALL THE WAYS GREGORY JOHNSON COULD HAVE CHOSEN TO EXPRESS HIS DISPLEASURE, HE CHOSE TO DESECRATE THE UNIFYING SYMBOL OF A NATION.

THE REASON THIS AMENDMENT IS REQUIRED IS THAT IT IS THE MOST EFFECTIVE WAY TO PROTECT THE PHYSICAL INTEGRITY OF THE FLAG. I AM ALSO A COSPONSOR OF THE FLAG STATUTE OFFERED BY THE DISTINGUISHED CHAIRMAN. I CONGRATULATE HIM FOR THE HARD WORK HE HAS PUT INTO THE STATUTORY APPROACH, AND I WOULD BE THE FIRST TO

SAY THAT, IF THE COURTS UPHOLD IT, A CONSTITUTIONAL AMENDMENT BECOMES UNNECESSARY. HOWEVER, WE CANNOT KNOW WITH CERTAINTY WHAT THE SUPREME COURT WILL DO IF FACED WITH THIS STATUTE. I BELIEVE, THEREFORE, THAT WE MUST CONTINUE TO PUSH FORWARD WITH THE CONSTITUTIONAL AMENDMENT.

ADDING AN AMENDMENT TO OUR CONSTITUTION IS DELIBERATELY DESIGNED TO BE VERY DIFFICULT. IT WILL TAKE A LONG TIME FOR THIS AMENDMENT TO BECOME PART OF OUR CONSTITUTION. BECAUSE OF THE TIME INVOLVED, IT MAKES SENSE TO GO FORWARD ON BOTH THE STATUTORY AND CONSTITUTIONAL AMENDMENT TRACKS. IF THE COURT UPHOLDS THE CONSTITUTIONALITY OF A FLAG DESECRATION STATUTE, THERE WILL BE AMPLE OPPORTUNITY TO STOP THE CONSTITUTIONAL AMENDMENT. IF, HOWEVER, THE COURT EVENTUALLY OVERTURNS THE STATUTE, WE WILL HAVE WASTED CONSIDERABLE TIME BY NOT STARTING TO MOVE FORWARD WITH THE CONSTITUTIONAL AMENDMENT NOW.

I HOPE S.1338 WILL PASS THE CONGRESS, BECAUSE IN THE END THE SENATOR FROM DELAWARE AND I SHARE A COMMON GOAL OF PRESERVING AND PROTECTING THE FLAG. OUR APPROACHES MAY BE SOMEWHAT DIFFERENT, BUT OUR INTENT IS THE SAME.

IT IS CLEAR TO ME THAT THE AMENDMENT BEFORE US WOULD BE AN EFFECTIVE CHECK ON THE ABUSE OF OUR NATIONAL SYMBOL WHILE NOT UNDERMINING THE PRINCIPLES OF FREE SPEECH. THE FLAG IS A UNIQUE SYMBOL. NO OTHER SYMBOL IN OUR NATION'S HISTORY HOLDS A SIMILAR PLACE IN THE MINDS OF AMERICANS. BECAUSE OF ITS UNIQUE NATURE, I DO NOT FORSEE THE PASSAGE OF THIS AMENDMENT AS THE BEGINNING OF FURTHER LEGISLATION PROHIBITING THE DESECRATION OF OTHER SYMBOLS IN OUR CULTURE SUCH AS THE PRESIDENTIAL SEAL. JUSTICE FORTAS, IN

STREET V. NEW YORK, WROTE THAT "[T]HE FLAG IS A SPECIAL KIND OF PERSONALITY...A FLAG MAY BE PROPERTY, IN A SENSE; BUT IT IS PROPERTY BURDENED WITH PECULIAR OBLIGATIONS AND RESTRICTIONS. CERTAINLY...THESE SPECIAL CONDITIONS ARE NOT PER SE ARBITRARY OR BEYOND GOVERNMENTAL POWER UNDER OUR CONSTITUTION."

I APPEAR BEFORE MY COLLEAGUES TODAY TO URGE ADOPTION OF THIS CONSTITUTIONAL AMENDMENT. WE SHOULD SEND THIS ON TO THE STATES FOR RATIFICATION. FOR AS JUSTICE STEVENS STATED IN HIS DISSENT IN TEXAS V. JOHNSON, IF "...THE IDEAS OF LIBERTY AND EQUALITY...ARE WORTH FIGHTING FOR...IT CANNOT BE TRUE THAT THE FLAG THAT UNIQUELY SYMBOLIZES THEIR POWER IS NOT ITSELF WORTHY OF PROTECTION FROM UNNECESSARY DESECRATION."

I THANK MY COLLEAGUES.

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The CHAIRMAN. I thank both of my colleagues, and let me say at the outset that this is one of those rare issues that I think that the vast majority of the Democrats and Republicans on this committee and in the Senate as a whole are united in our purpose. The purpose of these hearings, to restate it, is to find out what the best way to accomplish our purpose is.

I have a number of questions is, but I know you are equally if not busier than we are, and you will not be able to stay for all of them. I would just like to suggest to my colleagues, because I know both our colleagues indicated they have time constraints, notwithstanding how important they feel this issue is, I will just ask two brief questions and, to the extent that we can keep our questions short, it would be helpful.

Gentlemen, we heard very interesting testimony on the constitutional amendment from the President's spokesperson, representing the administration. When questioned on the constitutional amendment or the statute as opposed to the amendment, his response—and I will not take the time to read—his response basically was the statute is too neutral, it may theoretically protect the flag from being destroyed, but—and I am paraphrasing—that is not enough, no one wants a neutral statute which would meet constitutional muster, theoretically, not going after speech but the physical—like you indicated, Senator Dole, you cannot destroy currency, well, you know, I am convinced, and most scholars are, that we can pass a law that says this gavel cannot be destroyed, period. You cannot pass a law saying this gavel cannot be destroyed, because it cannot be destroyed when someone says, "I'm destroying this gavel to offend you," you cannot do that, but you can say all gavels like this just cannot be destroyed by anybody, for any reason.

They said that is not enough. You see, what the President wants is something more than a content-neutral statute. They want to get after what is considered to be acceptable behavior and unacceptable behavior, and that is why they said the statute and the constitutional amendment was written to say that they would leave it to the States to determine what constitutes desecration, so that, for example, if the State of Kansas believed it constituted desecration to allow a white supremacist group, that is constituted in every one of our States, there is some group like that, if Kansas passed a law saying it constitutes desecration, when the white supremacists who have a permit to march in the streets of whatever town, they can legally do that, but they cannot carry the flag symbolizing their organization.

The State of Delaware may pass a constitutional amendment that says no flag can be displayed in a circumstance that is associated with commercialization, so a hotdog vendor on the corner could not have an American flag slapped on his vending cart, or Coca-Cola could not do their advertisements that they do, and others, Pepsi-Cola, all the various things, and show it on television in the State of Delaware, that showed the flag waving and flapping behind a young man perspiring after a ballgame, drinking a Coca-Cola. And the State of Pennsylvania could do something differently.

So, my question to you gentlemen is this: Is your objective with the amendment to keep the flag from being burned, trampled on, destroyed physically, or is there another purpose, and that is to get at conduct beyond that, to get at other elements that surround dealing with the flag? Is that why the amendment is so open? That is the first question.

And the second and last question I will ask, because it is associated with that: Why will the constitutional amendment, as written, not spawn years and years of litigation about what constitutes desecration and what is a flag? They are my two questions.

Senator DIXON. Well, if my colleague would permit me to go forward first, I would attempt to answer from the perspective of this Senator only, because I am sure the Chair and the members of the committee can understand that each of us comes to our separate position on almost every issue in our own way.

Let me say for this Senator, who happens to be a lawyer, may I say to the Chair, but was essentially a personal injury and criminal trial lawyer, not a constitutional lawyer, that I am a cosponsor of the constitutional amendment, with my colleague from Kansas and some 50 others, because I am not sure that a statute will answer my concerns.

I hear what the Chair says. I respect the Chair and the other members, who have the view that we can do this by statute. I entertain some doubts about it. Having read this opinion and in my limited ability as a lawyer from a constitutional perspective, I see problems in the opinion in the *Johnson* case that may be ever present as long as the Court is at least constituted as it is now constituted, so that I see some concern, that when a statute goes up there, this Court might say, "Wait, we said 5 to 4, you know, that this is free speech and we are not going to change our mind." Then a good deal of time is passed, as my colleague, the respected Chair knows, maybe years, and we are back, you know, at the beginning of the same dispute.

So, I say do the statute and also do a constitutional amendment, but in direct answer to the second part of the Chair's question, all I am interested in doing here is protecting the integrity of that great national symbol, the American flag, preventing any type of desecration of that flag. That is all I am interested in doing here. And as I said in my remarks, it takes a two-thirds vote in both Houses and it takes 38 States before the constitutional amendment effectively limits what can be done, so that takes some time.

I believe, may I say to the Chair, that there will be further litigation, in any event, whether you have a constitutional amendment or whether you have a statute, this question will be, in my view, litigated to the finite conclusion about what can be done with respect to the flag as part of the whole general panoply of free expression in our Nation.

The CHAIRMAN. If I can modify the question slightly, to narrow it: The Chair acknowledges that the approach the Chair has taken with the statute—and I might add, the Chair has indicated that he thinks that there can be a constitutional amendment and there may need to be one, and I acknowledge that the statute potentially could be declared unconstitutional. I think the overwhelming view is it will not, but I acknowledge, there are no guarantees.

Senator DIXON. Yes; maybe it will not be.

The **Chairman**. My real question if, if we just focus on that—let us forget about the statute, put it aside, we are not going to do it, for the sake of discussion—is how does the present constitutional amendment, as drafted by my distinguished colleagues, deal with desecration, what does it mean, is it possible under the statute for the State of Kansas to say a white supremacist group cannot fly the American flag, in Delaware to say you cannot use it for anything relating to commercial undertaking, can that be done?

Senator **Dixon**. I say, as a lawyer, probably both of those things are OK under this constitutional amendment, but again, the distinguished Chairman knows better than this lawyer that all those things are questions for the Court ultimately to resolve, and I guess my answer to the chairman is this: I did not draw this constitutional amendment, it is OK with me, as a member and a lawyer, but at the same time I am not wedded to this language.

If in the infinite wisdom of this committee and this chairman there is some better language for a constitutional amendment that is the ultimate outgrowth of all these hearings, that is OK with me. I want to simply say for this Senator, I am here as a supporter of the constitutional amendment, because I do have some reservations about whether we can solve the desecration of the flag problem by a statute. If we can do it that way, that is a 100-percent OK with me. If we cannot, then I do want to do the ultimate last step to prevent the Johnsons of this world in their insanity from desecrating the flag. That is not, in my view, part of free speech, Mr. Chairman.

The **Chairman**. I thank the Senator.

Senator Dole.

Senator **Dole**. I think we get into what we mean by desecration, physical desecration. In fact, we considered that at the time, and some say the word is too vague, and I think that is the point raised by the Chairman, it could mean anything to anybody and should not be used in the amendment.

We checked and, according to the dictionary, "desecration" to treat an object of veneration irreverently or contemptuously. In fact, I am reminded by staff that in the opinion itself, Justice Brennan used the word "desecration" 10 times in the opinion, so if it were vague, it was probably vague there.

But to relieve any doubts or at least to try to relieve any doubts about what do we mean, what can they do in Kansas, what can they do somewhere else, what is a flag, that is going to be decided by State legislatures. They are going to make that determination under our amendment.

But we did in the preamble of the joint resolution try to define, by saying, "Whereas, physical desecration may include, but is not limited to such acts as burning, mutilating, defacing, defiling, or trampling on the flag, or displaying the flag in a contemptuous manner."

Some said, well, we should not put that in, it might limit it, it might be too broad. But it seems to me that that was an effort to define the phrase to some extent, because we know that it can be interpreted probably I do not know how many different ways, and then you get into what is the definition of a flag, and, again, that is going to be left up to the Congress and the State legislatures, and they have a number of options, they can even take the option that is now provided for by Federal statute, but I think there are going to be questions raised.

I think the problem with the statute is sort of content-neutral, it is over-broad, it can punish intentional as well as unintentional acts, and that raises some concerns, and whether or not it is constitutional, I think, as my colleague has pointed out, may be determined a long way down the road, and we believe—again, I am certain we find legal scholars and we can come up with the questions we cannot give you a precise answer to, and that is why we have the courts and that is why we are here—but we believe the constitutional route is the best way to go and we believe that the Senate should provide the two-thirds vote.

Now, whether they do it or not, I assume we are going to act on the statute first, I know the statute will pass. Will that take the steam out of the constitutional amendment effort? I do not think so at all. I think people may vote for the statute, saying, "Well, in the event the amendment doesn't pass, I'm on record for something that passed." But we do not have all the wisdom over here, as Senator Dixon pointed out. If somebody has a better idea, if they want to make a change—Senator Thurmond has a little bit different wording than this—certainly, we want to do the best we can, we want the best constitutional amendment possible when it reaches the Senate floor, and maybe it is not precisely what we have said.

The **Chairman**. I was not trying to quibble, because part of our charge given to us by the Senate was to report back a constitutional amendment and the best one, in the opinion of the committee and the best statute in the opinion of the committee, and so I will conclude with this: Would the—I do not expect the authors to answer this question now, necessarily, but I would ask you to consider this before we close out the hearings in the next couple of days—would they be satisfied, would their intentions be satisfied if there was a constitutional amendment that said that it is illegal, in any of the 50 States and territories, anywhere in American jurisdiction, to burn, mutilate, or destroy a flag, other than under a prescribed procedure laid out in the constitutional amendment, period? Would that be satisfactory? And I do not expect you to answer it now, it may take some thinking about it.

Senator **Dole**. I do not think it is broad enough, but I certainly would be willing to consider it, if you would give me the exact language, I would be happy to——

The **Chairman**. Well, I really do not have exact language, and I am just trying to get at this question of what is broad enough and what is not broad enough and what we are really trying to get after.

I have trespassed on your time too much. Let me yield to my colleague from South Carolina.

Senator **Thurmond**. Thank you, Mr. Chairman. I will only take just a couple of minutes.

Some have suggested a public sentiment for reversing the *Johnson* decision has lessened since this ruling has been handed down. I do not think so at all, and I wonder what your opinion is, Senator Dole and Senator Dixon.

Senator DOLE. Well, you are going to have Sparky Gierke up here in a minute and the American Legion is going to tell you that that is certainly not the case in petition drives that they have had.

I think some of the media—of course, some of the media do not care for the constitutional approach, some may not care for the statutory approach, they get into the first amendment, we are going to repeal the first amendment, which is not accurate.

Again, I think it is like other issues in the Congress. I have not heard a thing about the hostages for about 30 days, and I know the problem is still there. Issues are raised and they are very visible on television and in newspapers and we had the Court and we reacted in Congress, we passed a resolution 97 to 3 condemning the Court, so, you know, it is not the same intensity, but the support is still there.

Americans feel very strongly about this, they feel very deeply about this, and just because they do not beat us over the head every day does not mean the issue has gone away. I happen to believe that the people out there that you do not hear from, they do not write you complaining about this, they do not write you asking for something, these are that so-called silent majority out there who do not understand why we tolerate this, and if we can do it by statute, they would probably accept that, but I think they understand that the most certain way to make it happen is by constitutional amendment.

Senator DIXON. Well, Mr. Chairman, may I say to the distinguished ranking member, I can give you a poll taken August 26 through August 29 of this year, which is relatively recently, in the whole State of Illinois, by WCIA channel 3 in Champaign, the largest television station in Illinois, outside of Chicago: A constitutional amendment is approved in my State, are favored by 78 percent and opposed by only 20 percent, with only 2 percent undecided.

In area code 618, which is Southern Illinois, where I come from, south of Route 50 in my State, 88 percent of the people want a constitutional amendment, only 12 percent are unopposed. In area code 217, in the central part of my State, where the capital is located, in Springfield, 76 percent want a constitutional amendment, only 17 percent are opposed. In area code 309, which is Peoria, where Bob Michel comes from, 77 percent want a constitutional amendment, only 24 percent are opposed. In area code 815, northern Illinois, outside Chicago, 82 percent want a constitutional amendment, only 16 percent are opposed; and in Chicago and the surrounding vicinity, in area code 312, 74 percent want a constitutional amendment, only 23 percent are opposed.

I can break it down by Democrats, Republicans, Independents, male-female, 18 to 34, 35 to 49, 50 to 64, and 65 and over.

Senator DOLE. Equally patriotic.

Senator THURMOND. Thank you very much. I think that is very clear how the people feel.

Senator DIXON. May I say there is no party difference, there is no difference by gender or by age.

Senator THURMOND. It is overwhelming that the great majority of the people of this country favor taking action.

Senator DOLE. They do not get to hear all the experts, they get to make up their own mind.

Senator **Thurmond**. Now, President Bush recommended a constitutional amendment. I agree with him that that is a sound approach. You and Senator Dole have led the movement for that approach. I introduced one previously with slightly different wording, but we all have joined on the amendment now that you two have introduced, which President Bush recommended, and I am very pleased to support that.

Now, as we near the end of the hearings in the Congress on this issue, do you believe that President Bush is any less committed or has changed his opinion as to the need for a constitutional amendment to reverse the *Johnson* decision?

Senator **Dole**. No; in fact, I just happened to have had a meeting with the President last week with Congressman Michel, to talk about the agenda, and this is one thing that came up, the question, and he has not changed his view, he is just as strongly committed as he was and will remain that way.

Senator **Dixon**. Senator Thurmond, my position, as I have already stated it to the Chair, is I support both the statute and the constitutional amendment and feel that both are in order.

Senator **Thurmond**. I have stated my position, that I will vote for both the statute and the constitutional amendment. The statute might get results. The constitutional amendment will definitely get results, and that is the reason, if I had to choose one or the other, I would choose the constitutional amendment, but I will support both.

Thank you very much, Mr. Chairman.

The **Chairman**. Thank you very much.

Senator Leahy from Vermont.

OPENING STATEMENT OF SENATOR LEAHY

Senator **Leahy**. Thank you, Mr. Chairman. And I want to thank Bob Dole and Alan Dixon for their testimony here today. All of us have been back and forth in this room, usually listening to others testify, and it is good to have two such distinguished leaders of both parties here.

I think you have both stated that Congress should outlaw desecration of the American flag. I support that goal and out of 250 million Americans, I suspect there is less than a handful that would disagree with that. I think everybody supports that goal. For myself, I think the different times when I have traveled outside of the United States and have been in the capital of another nation and walked down the street, and all of a sudden there is the American Embassy and the American flag is flying, and you know the great feeling we have. Or you fly again outside the country and come back into ours and, whatever airport you land at, you see the American flag, there is the sense that we have, the same way when I fly it over my own home in Vermont or down here in Washington. It gives you a sense of satisfaction.

I think we all cherish the flag and would fight to protect it from destruction or dishonor, and one way or another, we have all done that. We also cherish the Constitution, and I think as Senators we have an obligation to fight to protect it from unnecessary amendments.

Now, we are going to prohibit flag desecration, but in the process we have to be careful not to chip away at the freedoms that have endured unscathed for the last 200 years. Look at the Bill of Rights, it has been there for 200 years, it has not been amended. It has survived two World Wars, the Civil War, battles over civil rights, economic catastrophe, Presidential assassinations and depressions, changing political atmosphere within the country and, in fact, even changing geographical boundaries of our Nation during those 200 years.

Despite all of these things, many of which have been enormous crises in this country, no Congress in history has succumbed to the pressures exerted by those who would alter this foundation of our democracy, and throughout those 200 years there have been numerous times, from either the left or the right or anywhere else, when people wanted to alter, because at that time, whatever the issue was, was so important that we should amend the Bill of Rights, and every Congress has resisted that.

I think we have to not forget that the Constitution is really more than just an abstraction. It is a contract. It is a contract between the people and their government that guarantees our right to say what we please, to practice the faith that we choose, to demand our elected officials preserve those freedoms.

Sometimes we appreciate the liberties only by contrast. I think of the reaction in the two cloakrooms, the Democrat and Republican cloakrooms, when we saw Chinese students being beaten or killed and the complete sense of revulsion to see this in people who are speaking out for change or speaking out for democracy; or when we see South African protestors senselessly brutalized. When we see that, we recognize the extraordinary nature of our democracy, and it is a democracy that sometimes we take for granted, because this country has guaranteed the rights of democracy more than any nation in recorded history.

Now, the chairman has proposed legislation that would protect the flag by changing the current Federal flag desecration statute, and constitutional scholars have testified before this committee that the chairman's proposed statute would pass constitutional muster, because it would outlaw flag burning in all circumstances, and I concur with that and I will support that statute, and I think that the scholars are correct.

But I have to think of what I hear in my own State of Vermont, a careful and cautious and conservative State. I am back there every week, sometimes a couple times a week. I live there. I talk to people in the stores and at the gas station or when I have stopped to pick up my mail or they may even drive by if I am mowing my lawn. Vermonters do not hesitate to express their feelings to me, and probably no more so in a small State than even a large State, and they say all the same things. They say protect our flag, they are uniform in that, but they say do not rush in to change our Constitution, if you change our Constitution on this, you will change it on the next abortion decision, for example, depending upon which sides does not like it; we change it on the next civil rights decision or the past ones of this past year; what if there is a major tax ruling by the Supreme Court, will we change it for that; what if there is an issue of gun control in the Supreme Court, will we change on that; on the issue of affirmative action, on campaign financing, all these different things, will we change our Constitution for each one of those.

I think the beauty of our Constitution is it stayed very short, very simple, and we have resisted change. We have a cumbersome method of changing the Constitution, and perhaps wisely so. We have the shortest constitution of any major country in the world. We have the best constitution, with guarantees of liberty and free speech and democracy that no country has ever matched in history, and no country has had the sense of worth and the sense of confidence to match it. And it is that sense of confidence and the sense of democracy that makes us great as a nation.

So, I would think we should pass the statute. I have so many of my close friends—and I consider the two witnesses two of my best friends in the U.S. Senate—so many of my close friends who support the constitutional amendment, but I would say go slowly, go slowly, be awfully, awfully careful when we handle this very, very precious heritage that we have received from our Forefathers, the very precious heritage that we have to pass on to our own children, in a careful, protected fashion. That is our responsibility.

We serve in the U.S. Senate as the conscience of the Nation, or should, and this is as time when I think each Senator has got to carefully, carefully examine their own conscience.

I do not know if our chairman has been abducted, but I will not use the rest of my time. That was not meant as a question, obviously, and if anybody wants to respond, fine, otherwise I was going to yield to Senator Hatch.

Senator Hatch.

OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Thank you, Senator Leahy.

I want to welcome both of you to the committee and thank you for your testimony and for your efforts to push a constitutional amendment.

I would just say this: I think Senator Leahy makes a very good argument why a statute should not be followed. First of all, if we value our Constitution, we should not be amending it by a simple statute, we should not be amending a Supreme Court decision by a simple statute.

I saw the cain raised when John East brought the human life amendment to the U.S. Senate—why, we cannot amend the Constitution of the United States by a mere statute, even though *Katzenbach* v. *Morgan* seems to suggest that you can. However, *Katzenbach* v. *Morgan* has pretty well been discredited by not being followed throughout the subsequent constitutional history of this country.

To make a long story short, you know, the best argument against the statute is that content-neutral language is not good enough, because the Supreme Court cannot help, when they look at any future decision, they cannot help but come to the conclusion that the purpose of the statute—and I want to ask you this question, do you agree with this, that the purpose of the statute, the undeniable purpose was to influence changes in the *Johnson* decision in the future? Do you both agree with that?

Senator DOLE. We both agree with that.

Senator DIXON. Of course.

Senator HATCH. Well, if that is so, then I do not see how we benefit the Constitution by amending it or a constitutionally decided case by mere statute. If we start doing that, we are going to have all kinds of problems around here. Do you differ with that basic assertion or fear?

Senator DOLE. No, and I do not think the Biden statute contains the sort of dirty flag defense that the House bill contains. There, if you want to burn the flag, all you do is dirty it up a little bit, dip it in the mud and it is okay to burn it. It seems to me that is ridiculous, the House proposal. But my view is that, as Senator Leahy said and as Senator Hatch has said, you know, we are going to be very deliberate and very slow, the Constitution requires it. This is not an easy course.

We have got three recent civil rights decisions, there is going to be at least an effort to overturn those by Senator Kennedy, Senator Metzenbaum, and others. So, when the Supreme Court acts, there are a lot of things that you can do, but on a constitutional question, it seems to me it has got to be met by constitutional amendment and that is where we are coming from. As Senator Dixon has made it clear, he supports either approach. I believe the constitutional approach is better.

Senator HATCH. I do not want to keep you any longer, but let me just say this: I think you both would agree that this is a 14th amendment case, not a first amendment case. That is what the case was decided upon, and I got a kick out of all the screaming and shouting about the first amendment rights being interfered with. I think you have got to be clear about what is actually being amended here, either by the constitutional amendment or the statutory approach.

The proposed amendments do not change the original Constitution, either of them, and they do not alter the Bill of Rights. Your amendment does not do that. Do you agree with that?

Senator DOLE. It certainly does not.

Senator HATCH. All right. Instead, what they both seek to do is reverse a 1989 Supreme Court interpretation of a 1791 amendment to the original Constitution, as made applicable to the States by a series of early 20th Century Supreme Court opinions interpreting an 1868 amendment to the Constitution.

So, what is proposed is less than an amendment to the Constitution than an amendment to the opinion of the Court, which the change of one vote would have changed anyway.

So, I just want to personally thank you. I am going to vote against the statute. At first, I thought I could support it, but then I thought, well, I have always taken the position that you should not amend the Constitution by a simple majority vote, you literally should not, in spite of *Katzenbach* v. *Morgan*, you should not be doing that, or even a constitutionally decided case, and therefore the only valid way of doing this, the only constitutionally valid way of doing this, and I think the effective way of doing it would be through your approach, a constitutional amendment, so I intend to support you all the way on that.

Thank you. I am sorry to keep you.

[The statement of Senator Hatch follows:]

From the office of

SEN. ORRIN HATCH

Washington, D.C. 20510

September 12, 1989 Contact: Paul Smith, 202/224-9854

STATEMENT OF SENATOR ORRIN HATCH
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY
HEARING ON THE DESECRATION OF THE FLAG

Mr. Chairman, I am pleased that the Judiciary Committee has convened again this morning to conduct hearings on the important subject of protecting the flag of the United States from those who would desecrate or cast contempt upon it.

We rarely get to explore a single subject with the thoroughness that we have devoted to our investigation into the question of how best to respond to the Supreme Court's June decision in the case of Texas v. Johnson. Such thoroughness has been particularly useful in this case.

There are really only three positions which have been expressed with respect to the key issue before us. First, there are those who believe the Johnson case was correct and who would not seek to modify its result. Second, there are those, like myself, who believe that Johnson was incorrectly decided and that its result can only be changed by means of a constitutional amendment. Finally, there are others who disagree with the holding in Johnson but assert that a simple statutory modification will be sufficient to change the outcome of future litigation raising the constitutional issue decided in Johnson.

But these positions have not been advocated with equal strength in the hearings so far. There have been many witnesses for the first view, several for the second, but none, so far as I can see, for the last. In support of the first position, many academics have appeared to tell us that Texas v. Johnson was correctly decided, that it's just a natural development of the Supreme Court's previous First Amendment jurisprudence, which, if we only understand it better, we would agree with.

But their testimony has been controverted by constitutional law scholars, such as Judge Bork and Charles Cooper, who unquestionably do understand the Supreme Court's recent First Amendment jurisprudence. Together with William G. Barr of the Department of Justice and historian Forrest McDonald, these witnesses for the second position asserted, and demonstrated through their examples, that only a constitutional amendment can produce a different result in future litigation challenging the constitutionality of flag desecration statutes.

Then there is the third position — the view that asserts that although *Johnson* was wrongly decided, it can be remedied simply be amending the federal flag desecration statute. So far that view has been most notable for the fact that no witness has shown up to argue its favor. Instead, every witness who has suggested that the statutory approach might work has also gone on explicitly to support the result of the *Johnson* case or has otherwise urged us not to try and change the result in *Johnson*, preferring that we leave the situation as is.

I believe the unequivocal testimony of the Department of Justice's top constitutional law scholar is persuasive As he so succinctly put it, any statute aimed at changing the result of the *Johnson* case will, if challenged in future Supreme Court litigation, be "dead on arrival." Why take the chance?

The array of witnesses that we have heard so far teach us one important thing: in order to overturn *Johnson*, we have to support the constitutional amendment approach. It is that simple.

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The **Chairman**. Let me ask something a bit unusual of my colleagues. Both of our distinguished colleagues have pressing business and they informed me of that prior to the beginning of their testimony.

Senator **Dole**. Mine is a meeting with the majority leader at 10:30.

The **Chairman**. Yes, and from my side of the aisle, that is pressing.

Senator **Dixon**. We will be going to the same meeting. That is what I was supposed to be doing at 10:30.

The **Chairman**. If anyone has a question they feel they must ask, why do we not ask it, otherwise we will have an opportunity to obviously continue this discussion, both in committee and on the floor. I do not want to cut anybody off, but——

Senator **Simon**. Just one, if I may ask both of my colleagues, for whom I have great respect, and I join in differing with the Supreme Court decision. If we can handle it by statute, why do a constitutional amendment?

Senator **Dixon**. Well, may I say to my dear friend and colleague, I had indicated earlier to the chairman this Senator's view, which is only one Senator's view, and that is that I entertain some doubt about whether this Court, at least, as presently constituted, would reverse the position it already took in *Johnson*, so I entertain some doubt about whether you can do it by statute. Now, maybe you can, and if you can, I do not have any problem about that. That is why I am voting for the statute. I respect the opinion of my friend from Utah, but would differ in it by saying that the Court always can change its mind. That was a 5-to-4 decision. I doubt that it will. I doubt that it will change, and for that reason I move to the constitutional amendment.

And may I simply say to my colleague, I respect the point of view of others who say let us not tinker with the Constitution, but candidly, I have supported other constitutional amendments in my time. I supported the equal rights amendment, for instance. Now, I have opposed other constitutional amendment from time to time, as well, so I suppose some and I support some. I am a pragmatist, not a purist, about that, and I am for a constitutional amendment, if a statute will not do it, and I entertain some doubts—I'm not sure—that a statute will.

Senator **Dole**. I think just generally the same, Senator Simon. I think if we were certain it could be handled by statute, that would be the easiest thing to do. I have some of the same reservations Senator Hatch has about amending the Constitution by statute, but we do not know and I guess the question of how long before we would know, and I must confess, I am not certain whether there is some expedited procedure in the statute or not, but who is going to burn the flag to get it there, is somebody on the committee going to volunteer to burn one to test the Court? Count me out.

The **Chairman**. Not me. [Laughter.]

Senator **Dole**. So, I think by constitutional amendment we could be certain that it was done.

The **Chairman**. Gentlemen, thank you very, very much.

Senator **Thurmond**. Thank you very much for your appearance.

The CHAIRMAN. Now, I say ahead of time, our next distinguished witnesses all—several have time commitments we said we would try to honor, and we will, but they will come up as a panel.

Our next panel constitutes a highly distinguished group of Americans. First is H.F., better known as "Sparky" Gierke, who just completed his term as national commander of the American Legion, and who is a sitting justice on the North Dakota Supreme Court. Justice Gierke served 4 years in the U.S. Army in the Judge Advocate Court, and he was a military trial judge in Vietnam. Would you rather be called commander or Mr. Justice?

Our next distinguished member of the panel is John Heilman, national legislative director of Disabled American Veterans. Mr. Heilman served in Vietnam as an officer in B Company, at First Reconnaissance Battalion, First Marine Division, and is a very distinguished member, indeed.

Our next member of the panel is Walter Hogan, commander-in-chief of the Veterans of Foreign War. Mr. Hogan served with distinction in Vietnam as a rifle platoon corpsman with the Marines.

Next is R. Jack Powell, executive director of the Paralyzed Veterans of America. Mr. Powell served in the Army in Vietnam for 6 years between 1965 and 1971, and he has a long history of involvement in work with the disabled community.

Last, but certainly not least, the final member of the panel is Mary Stout, national president of the Vietnam Veterans of America. Ms. Stout served as lieutenant in the Army Nurse Corps from 1966 to 1967, and I would note that she is the only woman in our history who has served as president of a major veterans organization. Ms. Stout is accompanied today by Paul Egan, the organization's legislative director.

It is a distinguished panel, indeed, and as the American public will soon find out from television and as my colleagues already know, it is not only reflection of the wide spectrum of representation of the wide spectrum of veterans, you will find that it represents a wide spectrum point of view.

I ask one question before we begin. Mr. Justice, you have an 11:20 plane—you must leave here at 11:20 to catch your plane.

Mr. GIERKE. I am afraid so, sir.

The CHAIRMAN. And I ask if any of the other members have a similar time constraint?

[No response.]

The CHAIRMAN. Well, what I would suggest we do is that we hear your testimony first, Commander, and then if we have any short questions for you—any one of us—go directly to that, and then hear from the rest of the panel to allow you to catch your plane.

Senator LEAHY. Mr. Chairman, I just wanted to mention I am leaving at this point only because we have rearranged one of our other committee markups. I mention that, seeing two marines on the panel, we rearranged it so I can go down and watch my son finish his basic training at Camp Lejeune tomorrow morning in the Marines. He is in better shape physically, now, than I am.

The CHAIRMAN. He always has been, I might add, but I am sure we would understand that.

Why don't we begin? Sparky, why don't you begin with your statement, and the shorter you can keep your statements the more exchange we can have and the more we can hopefully learn.

PANEL CONSISTING OF H.F. GIERKE, FORMER NATIONAL COMMANDER, AMERICAN LEGION; JOHN F. HEILMAN, NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS; WALTER G. HOGAN, COMMANDER IN CHIEF, VETERANS OF FOREIGN WARS OF THE UNITED STATES; R. JACK POWELL, EXECUTIVE DIRECTOR, PARALYZED VETERANS OF AMERICA; AND MARY R. STOUT, NATIONAL PRESIDENT, VIETNAM VETERANS OF AMERICA, INC.

STATEMENT OF H.F. GIERKE, FORMER NATIONAL COMMANDER, AMERICAN LEGION

Mr. GIERKE. Thank you very much, Mr. Chairman, members of the committee. I appreciate very much your courtesy in allowing me to speak initially, and also I apologize for any inconvenience that it causes you, members of the committee or my fellow members of the veteran's community.

Thank you for the opportunity to testify in support of a constitutional amendment prohibiting the physical desecration of the United States flag.

The 4 million men and women of the American Legion, the American Legion Auxiliary, and the Sons of the American Legion are united in their resolve to see that the will of the majority of Americans becomes law.

Earlier, Senator Dole spoke of a young man by the name of Gary Freeman, who had gone out on his own. He is a legionnaire. He had gone out to get some signatures on petitions with regard to this matter. In a short period of time, as I am sure he will tell you, he obtained over 2,500 signatures.

On August 31, I presented to Senator Dole, Senator Warner, Congressman Solomon, and Congressman Douglas a representative number of petitions reflecting approximately 1 million signatures, and they continue to come into the American Legion headquarters at about 50,000 per day.

As we all know, the thing that brings us here is in 1984, outside an arena in Dallas, TX, where the Republican National Convention was being held, Gregory Lee Johnson carved out his own tawdry place in history by burning the U.S. flag while he and his fellow demonstrators chanted, "America, the red, white and blue, we spit on you."

Then, when the State of Texas prosecuted him for flag desecration, he wrapped himself up in the same flag he had burned and spat upon and sought protection under the law that it symbolizes. Eventually, of course, the Supreme Court heard the case, and the rest is history.

There are some who feel that the high court's split decision merely reinforces the strengths of our laws, that we can tolerate the most repugnant of acts and extend first amendment protection to those who exploit the very laws that shield them.

There are some who feel that Johnson's victory is a victory for us all because it keeps us off that slippery slope where our freedom of speech would surely slide away if curtailed in any manner.

There are even some who take curious comfort in their belief that the Court's decision is merely an admission of reality. They point to the gross commercialization of the flag as it hails from the roof of the corner filling station or grocery store.

We believe that this is nonsense. The flag flies as a celebration of our free enterprise system, that it affords every man and woman the opportunity to pursue their own private dreams as far as their talents and skills will take them.

Our flag stands with honor in our houses or worship because it is a symbol of our religious freedom. It waves over our schools as a testament to our heritage and to our freedom of opportunity.

It flies over our State houses and Federal buildings as testimony to our representative form of government. And it flies in our yards and from our homes as a reminder that we are a people free today because of those who paid a dear price throughout all of our yesterdays.

You don't have to be a veteran to understand what the American flag means, nor do you have to be a super patriot to understand that the symbols of our freedom deserve to be protected.

Tens of thousands of brave, selfless American men and women have died to protect our flag from desecration at the hand of our enemy. We have a sacred obligation to ensure that their flag will not now be desecrated by those whom they died to protect.

We stand on a slippery slope, indeed, if we as a Nation are not sufficiently offended by the desecration of our flag to be moved to action. I am confident, however, that we will have a redress of our grievances that recognizes the rights of millions who revere our flag and deeply oppose the desecration of this primary symbol of our American freedom.

Mr. Chairman, it has now been almost 3 months since the Supreme Court decision. The issue has been debated and discussed in all corners of the Nation from the halls of Congress to the local barbershops. Our Nation's greatest legal experts have presented their views and vast amounts of media attention have been directed toward the issue.

After carefully evaluating all the arguments presented since late June, the American Legion remains convinced that a constitutional amendment is the only sure way to protect our flag from desecration.

Just last week at our 71st annual national convention, more than 3,000 delegates unanimously adopted a resolution calling for a constitutional amendment. As the presiding officer at that gathering, I can tell you there was not a single dissenting vote.

There are participants in this debate who have stated that the American public does not support a constitutional amendment, and there are others who feel that such an amendment would restrict our constitutionally guaranteed freedom of speech. We disagree on both counts.

A recent Gallup poll reveals that almost two-thirds of all Americans actively support an amendment to protect our flag, and 70 percent believe that their freedom of speech would not be jeopardized by such an amendment.

Mr. Chairman, although the matter of flag desecration is no longer carried as a front-page item or as a lead story by the Nation's media, I can assure you that the American public continues to be outraged by the June 21 Supreme Court decision.

In view of this, the decision that remains is the most appropriate way to protect our flag. We therefore encourage you and your colleagues to resist the urge to take the most expedient course of action, and we encourage you to take the most effective course of action to recommend full Senate adoption of a constitutional amendment.

That concludes, Mr. Chairman, members of the committee, the American Legion statement, and I would gladly try to answer any questions that you may have.

[The statement of Mr. Gierke follows:]

Statement of

The American Legion

1608 K STREET, N. W.
WASHINGTON, D. C. 20006

by

H.F. "SPARKY" GIERKE, PAST NATIONAL COMMANDER
THE AMERICAN LEGION

before the

COMMITTEE ON JUDICIARY
UNITED STATES SENATE

on

Support for a Constitutional Amendment to Prevent Flag Desecration

September 13, 1989

STATEMENT OF H.F. "SPARKY" GIERKE, PAST NATIONAL COMMANDER
THE AMERICAN LEGION
before the
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
September 13, 1989

Mr. Chairman and Members of the Subcommittee:

Thank you Mr. Chairman for the opportunity to testify in support of a constitutional amendment prohibiting the physical desecration of the United States flag. The 4 million men and women of The American Legion, The American Legion Auxiliary and The Sons of The American Legion are united in their resolve to see that the will of the majority of Americans becomes law.

The First Amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." When our Founding Fathers wrote the First Amendment to the Constitution, they made it clear that certain basic freedoms would be extended to all citizens. Eloquent in its simplicity, this first article of our Bill of Rights set forth certain "unalienable rights" never before guaranteed to a nation's people. Surely when they had finished writing, the authors looked upon their work with a certain sense of pride, for even the most common of people would have no difficulty understanding their rights.

As I now re-read this basic statement of human dignity and ponder the body of law that has sprung up around it, I ask myself how, in the name of all that our nation stands for, could our highest court interpret these words to mean that it's okay to burn our flag in protest?

On June 21st, Gregory Lee Johnson carved out his own tawdry place in history by challenging our right to protect from desecration the one symbol of our nation that has stood tall through shot and shell, and has been purchased with the blood to patriots. Outside of an arena in Dallas where the Republican National Convention was being held in 1984, Johnson burned the United States flag while he and fellow demonstrators chanted, "America, the red, white, and blue, we spit on you!"

Then, when the state of Texas prosecuted him for flag desecration, he wrapped himself up in the same flag he had burned and spat upon, and sought protection under the law it symbolizes. Eventually the Supreme Court heard the case and ruled that desecration of the flag as a form of political expression was permissible under the freedom of speech clause of the First Amendment.

There are some who feel that the high court's split decision merely reinforces the strength of our laws, in that we can tolerate the most repugnant of acts and extend First Amendment protection to those who exploit the very laws that shield them. There are some who feel that Johnson's victory is a victory for us all because it keeps us off that "slippery slope" where on our freedom of speech would surely slide away if curtailed in any manner. There are some who feel that this case proves that our flag is a political icon and nothing more.

It is difficult to speak about what has happened, yet it is impossible to be silent. What has happened to our nation? Why are we now debating the political and intellectual ramifications of the decision? Why are we patiently listening to this nonsense about how it enriches our American heritage? Why do we feel no joy over this great constitutional victory?

Surely, neither our Founding Fathers, nor members of Congress, nor anyone in the history of our republic ever intended that anybody should be allowed to burn the very flag that has been draped on the caskets of those who died to preserve all that it represents.

Let the whole world intellectualize it, and it won't change a thing. Let the whole world politicize it, and it won't change a thing. This is neither a liberal issue nor a conservative issue. Our flag is neither a Republican flag nor a Democratic flag. Old Glory doesn't subscribe to any creed but the American creed.

Some take curious comfort in their belief that the court's decision is merely an admission of reality. They point to the "gross commercialization" of the flag as it hails from the roof of the corner filling station or grocery store. This is nonsense. The flag flies as a celebration of our free enterprise system that affords every man and woman the opportunity to pursue their own private dreams as far as their talents and skills will take them.

We are a nation born of immigrants, many of whom risked their lives under this flag. Whether they docked at Ellis Island or in San Francisco, one of the first sights they beheld was Old Glory waving proudly in the air that was free. They knew it was not the flag of their fathers, but it would be the flag of their children, and of their children's children.

Neither was it the flag of a perfect nation, but it was the banner of a good nation that strove for equal justice and opportunity for all. It was a flag that embodied all of their hopes for a better tomorrow. It was their flag, and not the flag of their king - it was the flag they would revere, protect and even die for.

The flag stands with honor in our houses of worship because it is a symbol of our religious freedom. It waves over our schools as a testament to our heritage and to our freedom of opportunity. It flies over our state houses and federal buildings as testimony to our representative form of government. And it flies in our yards and from our homes as a reminder that we are a free people today because of those who paid a dear price throughout all of our yesterdays.

Many Gold Star Mothers know only too well what our flag means. I met such a mother during a recent visit to Pennsylvania, a woman who had lost a son in Vietnam. She told me that each time she looks at or touches that folded flag presented to her by a grateful nation, she remembers her son and senses his presence. It's easy to imagine what she is feeling right now.

Is there any argument which could persuade anyone who has followed our flag into harm's way that it's now okay to tear it from its flag staff, douse it with lighter fluid, spit on it, curse it and burn it... as an expression of free speech protected by the Constitution it symbolizes?

You don't have to be a veteran to understand what the American flag means, nor do you have to be a "super patriot" to understand that the symbols of our freedom deserve to be protected. Tens of thousands of brave, selfless American men and women have died to protect our flag from desecration at the hand of our enemies. We have a sacred obligation to ensure that their flag will not now be desecrated by those they died to protect.

We are here to exercise our right under the First Amendment to "petition the Government for a redress of grievances." This issue will not resolve itself. The Supreme Court's decision can only be reversed by the manifested will of a people who are stirred to action. Desecration of our nation's banner is an evil act. It cheapens the lives and sacrifices of those who given their last full measure of devotion for their country. Yet, as a wise man once observed, "The only thing necessary for the triumph of evil is for good men to do nothing."

We stand on a slippery slope indeed, if we as a nation are not sufficiently offended by the desecration of our sacred symbols to be moved to action. I am confident, however, that we will have a redress of grievences that recognizes that rights of the millions who revere our flag and deeply oppose the destruction of this primary symbol of our American freedom.

Mr. Chairman, it has now been almost three months since the Supreme Court decision. The issue has been debated and discussed in all corners of the nation -- from the halls of Congress to the local barber shops. Our nation's greatest legal experts have presented their views, and vast amounts of media attention have been directed toward the issue.

After carefully evaluating all the arguments presented since late June, The American Legion remains convinced that a constitutional amendment is the only sure way to protect our flag from desecration. Just last week at our 71st National Convention more than 3,000 delegates unanimously adopted a resolution calling for a constitutional amendment. As the presiding officer at that gathering, I can tell you that there was not a single dissenting vote on the resolution.

There are participants in this debate who have stated that the American public does not support a constitutional amendment, and there are others who feel that such an amendment would restrict our constitutionally-guaranteed freedom of speech. We disagree on both counts. A recent Gallup Poll reveals that almost two-thirds of all Americans actively support an amendment to protect the flag, and 70 percent believe that their freedom of speech would not be jeopardized by such an amendment.

Mr. Chairman, although the matter of flag desecration is no longer carried as a front page item or as a lead story by the nation's media, I can assure you that the American public continues to be outraged by the June 21 Supreme Court decision. In view of this, the decision that remains is the most appropriate way to protect our flag. We, therefore, encourage you and your colleagues to resist the urge to take the most expedient course of action. We encourage you to take the most effective course of action -- to recommend full Senate adoption of a constitutional amendment.

The **Chairman**. I will limit myself essentially to two questions in order to accommodate your plane.

One, would you and the organization you represent representing millions of veterans—would you be satisfied if the statute were passed and the constitutional amendment would pass, and the Supreme Court ruled that the statute was completely constitutional? Would you still insist that the constitutional amendment go forward?

Mr. **Gierke**. I would say to that, sir, no. Our purpose is not to complicate matters.

The **Chairman**. I didn't think it was. None of this is pejorative. I have not made up my mind on the second issue. I think the first can be done, but I can't swear to that. I can't read the minds of the court or any future court.

The second point is that, again, I have heard no one but the administration witness testify that what we are really trying to get after here is more than merely the destruction of the flag, and I ask you this question, and it is not meant to be facetious.

You used the phrase that the flag flying over the corner gas station, the grocery store, et cetera, and you said that this is the flag that symbolizes a number of things, including our free enterprise system, which I don't disagree with.

This is not meant to be facetious. I think this is a real issue. Do you think a State would, could, or should, under this constitutional amendment, outlaw the use of the American flag by the socialist party at their conventions?

To be more precise, up until this term, there has been a socialist mayor in Vermont. He has run as a socialist and won every time as a socialist. Is it appropriate for that socialist mayor and his party, when they convened to determine their nominees, to use the American flag as a symbol on their socialist literature as well as their activities?

Mr. **Gierke**. That particular issue we have not considered. I personally have not considered it. That is not, in my view, personally, what we are all about, nor are we all about somebody being prosecuted for leaving their flag out at night without a light shining on it or in the rain or letting it touch the ground when they bring it down.

What we are interested in is not having it desecrated to the extent that it was by destruction, by walking on it, by burning it, and things that are obviously offensive to nearly all Americans.

The **Chairman**. I thank you because that is a very, very important point to make for even those who support it. We are essentially trying to stop what was done, and we are not out there trying to see to it that the local hot dog vendor can't have a flag on the side or that as repugnant as it may be to us that the white supremacists or the American Nazi party can't fly the American flag next to the Nazi flag or that the socialist party can't fly it.

But I suspect—and I asked you to consider this in your organization—I suspect we may find ourselves in that dilemma——

Mr. **Gierke**. Yes, sir.

The **Chairman** [continuing]. If this amendment passes, and I am thinking about attempting to amend the amendment. I am not sure I know how to do that, yet, because I am worried that if a legislator in my State introduced a resolution as this amendment defining under the constitutional amendment what constituted desecration—and you all know legislative bodies—and said, "It constitutes desecrating the flag if bang, bang, bang, and if the American flag is flown with the Nazi emblem."

I don't know a legislator in my state that would have the political fortitude to say, "Now, I'm going to vote against that." Do any of you know anybody? Individuals, but not many republican parties or democratic parties would say, "Wait a minute," because then we would have the argument, "Look, that's what we fought World War II for. We fought against that."

Or if they said in the State of Vermont, "The American flag cannot be flown at the socialist convention," but actually elect somebody. I can't imagine many people saying, "I'm going to vote against that." That goes too far.

So, I think we have to be real careful here as to what we are really trying to reach, and your laying out what you are trying to reach has been helpful.

I apologize for going on. The Senator from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman. I just have three questions here, and I would like to get your opinion on each one of them.

Can you describe the majority opinion of your members from the mail and petitions that you have received in your national headquarters since the *Johnson* decision? Just very briefly.

Mr. GIERKE. Senator Thurmond, Mr. Chairman, I would say that it has been overwhelmingly in favor of doing something and primarily in favor of the constitutional amendment.

Senator THURMOND. Now, you are speaking for the American Legion?

Mr. GIERKE. That's correct, sir.

Senator THURMOND. All right, Mr. Heilman.

Mr. HEILMAN. Yes, sir.

Senator THURMOND. You are speaking for the DAV now?

Mr. HEILMAN. Yes, sir. Do you wish me to defer until the commander leaves?

Senator THURMOND. If you want to say, just say you agree.

Mr. HEILMAN. Our membership believes there should be appropriate criminal sanctions for willful public desecration of the flag. They believe that overwhelmingly.

The CHAIRMAN. Mr. Thurmond, we are trying to get the commander of the American Legion out in time to catch his plane.

Senator THURMOND. Oh, I see.

The CHAIRMAN. For now, we will refrain from and direct questions only to the American Legion. It will be useful that way he can leave here at 11:20 to catch his plane.

Senator THURMOND. The next question is with the exception of Ms. Stout representing the Vietnam Veterans of America, is it the opinion of the American Legion, DAV, VFW and Paralyzed Veterans of America that a statutory approach is unlikely to be effective in reversing the *Johnson* decision?

Mr. GIERKE. That is our position, Senator Thurmond. Our concern is that the language of the opinion, we believe, is broad enough so that no matter what law is passed prohibiting the burning or other destruction of the flag, that if somebody of Gregory Johnson's ilk takes the flag to the town square and burns it and says, "I'm doing this as a matter of protest against what our Government is doing," that *Johnson* v. *Texas* stand for the proposition that any law prohibiting it will be unconstitutional. That is our fear.

Senator THURMOND. And what special significance would you say is attached to our flag by soldiers who have gone into battle in defense of our Nation?

Mr. GIERKE. Sir, anything that I could respond to that would probably be exemplified by the Iwo Jima Memorial and what that constitutes, when it was done, how it was done, and why it was done.

Senator THURMOND. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Simpson.

Senator SIMPSON. I know the commander has to leave, and I will let him skip out. I haven't even said anything. Isn't this remarkable? Not a word, not one single word yet. Let the record reflect that, and next I would like a written statement inserted into the record.

[The written statement of Senator Simpson follows:]

OPENING STATEMENT OF SENATOR ALAN K. SIMPSON, WYOMING, BEFORE THE SENATE JUDICIARY COMMITTEE HEARING ON DESECRATION OF THE AMERICAN FLAG; HELD IN SR-325, SEPTEMBER 13, 1989

Thank you Mr. Chairman, and welcome to our distinguished panels: The representatives of my fellow veterans associations, the member of the V.F.W., The American Legion, and the Vietnam Veterans of America. I am an honorary member of the Vietnam Veterans of America. It is an honor of which I am very proud; very proud.

Unfortunately, I may have to leave these hearings early. I want you to know, however, that I take this subject very seriously and I will keep informed about what transpires here today.

There is virtually no single issue in recent times that has caused such immediate and widespread debate as the Supreme Court's recent decision in Texas v. Johnson.

I will never understand why some 'nut' would do such a thing as to desecrate the single most highly regarded symbol of our great country---but that tolerance and forbearance shows a great country.

As you know, I have the great privilege of co-sponsoring a joint resolution presented by my Senate Colleague Strom Thurmond proposing an Amendment to the Constitution which would preserve its rightful status and provide the necessary protections to ensure that similar acts of desecration would be punished in the future.

Also, I support the 'Biden-Roth-Cohen Flag Protection Act of 1989' as a reasonable, common-sense alternative to the more complex task of ratification of a Constitutional Amendment.

I, like our distinguished guests from the Paralyzed Veterans of America, am open to either approach.

We all agree on one thing: Desecration of our National Symbol, the American Flag, is morally and socially reprehisible.

I am eager to hear your input and receive yoursuggestions. Thank you all for coming and participating inthese hearings.

Thank you Mr. Chairman.

The **Chairman**. All right, the Senator from Iowa, Senator Grassley.

Senator **Grassley**. I won't ask you any questions because you need to leave. But I want to say thank you for your position. I agree with it. As a cosponsor of the legislation, I am surely glad to have the support of these fine veterans organizations.

Mr. **Gierke**. Mr. Chairman, may I just say, too, that as a member of the American Legion and the Veterans of Foreign Wars, it is a great pleasure always to see these leaders of my organization. Thank you.

The **Chairman**. Thank you very much.

Mr. **Gierke**. If I may just make one closing observation.

The **Chairman**. Sure.

Mr. **Gierke**. And that is that on page 20 of the opinion of Justice Brennan, if I may just quote for a moment, he says,

> There is, moreover, no indication, either in the text of the constitution or in our cases interpreting it, that a separate juridical category exists for the American flag alone.

If the statute will not solve it, it is our feeling that we want to supply for the Justices of the future evidence in the text of the Constitution affording our flag a special position.

The **Chairman**. Thank you very much. I hope you catch your plane.

Senator **Thurmond**. We appreciate your presence, thank you.

Mr. **Gierke**. I appreciate all the courtesies and the opportunity to be heard.

The **Chairman**. We will now move on, and the real thanks goes to the remaining four of you to be so kind to your colleague to allow that to take place. Your opinions are equally as well respected, and we are equally as anxious to hear them.

So, John, if you would begin, and to the extent you can, identify again for the record the organization you are speaking for if you are speaking for them and any other thing you would like to say.

STATEMENT OF JOHN F. HEILMAN, NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS

Mr. **Heilman**. Thank you, Mr. Chairman. Mr. Chairman, on behalf of over 1.3 million members of the Disabled American Veterans and its ladies auxiliary, may I say that our organization deeply appreciates this opportunity to participate in these proceedings.

The recent Supreme Court decision in *Texas* v. *Johnson*, which ruled that public desecration of the flag of the United States is a legal, permissible form of free speech protected by the first amendment to the Constitution has evoked a fire storm of criticism throughout America.

Let me state at the outset that the Disabled American Veterans was and remains deeply offended by this ruling. There is no doubt in our mind that the vast majority of Americans are equally offended.

The American flag is our national ensign, a proud an courageous symbol of our Nation's precious heritage. As such, it has been carried and defended in battle, revered and cherished by its citizens, and viewed as a beacon of hope and freedom by people throughout the world.

Since it was first unfurled at the birth of our Nation, over 1 million men and women serving in our Armed Forces have paid the supreme sacrifice, life itself, so that the stars and stripes in all its glory can snap against an azure sky.

Desecrate the flag? The very idea is abhorrent. Yet, in the wisdom of five Justices of the Supreme Court, who under no circumstances that we can conceive of would perform the act themselves, it has now been determined that Americans must allow such desecration in order to preserve the right of freedom of speech.

Mr. Chairman, as indicated above, the DAV is in strong disagreement with the Court's decision. We do not believe that public desecration of the American flag without appropriate criminal sanctions should be countenanced under any conditions.

This is not to say that we do not recognize or accept the validity and fundamental importance of the debate surrounding this issue. Specifically, can such desecration be prohibited without endangering the constitutional first amendment guarantee of freedom of speech? And related to that question, what is the best approach to take to prevent desecration of the flag, specific legislation crafted to withstand a constitutional challenge or an amendment to the constitution itself?

Regarding the first question, Mr. Chairman, the DAV believes that prohibitions against desecration of the flag are no inimical to the rights of freedom of speech. It is important to note that four Justices of the Supreme Court concur in this belief.

We in the DAV are not lawyers. We are not constitutional scholars, and we cannot argue the point as such, but as an organization of veterans disabled in the war time service of our country, we can give you our visceral reaction to the Court's ruling. That is, to put it simply, one of stunned disbelief.

Mr. Chairman, there are laws in this country which inhibit or prohibit certain forms of speech, behavior and expression. Witness statutes against shouting "fire" in a public theater, laws against libel, and laws prohibiting certain types of public behavior.

We ask in the admittedly unsophisticated manner of the layman if it is within the framework of the Constitution to prohibit certain forms of speech, expression or behavior deemed dangerous, irresponsible, morally indefensible, or otherwise repugnant to the general mores of our society, why is desecration of the flag any different?

Does anyone really believe that the framers of the Constitution intended the first amendment to serve as a means by which individuals who do enjoy the unfettered right to express an opinion in both oral and written form can publicly desecrate a symbol so sacred to Americans that it alone is given the honor of shrouding the moral remains of those who have fallen in battle?

In 1984, Mr. Johnson and those of his ilk were not arrested for chanting, "America, the red, white, and blue, we spit on you." They had the right then, and they have it to this day to speak their mind. And if public desecration of our flag is ultimately determined to be illegal, they would still have the right to utter whatever contemptible words they may wish. That is freedom of speech.

We submit that such a freedom is not endangered by prohibitions against behavior such as burning the flag which is designed not to communicate a point of view but rather to incite a violent public reaction.

Mr. Chairman, we call upon this committee and the Congress to quickly and decisively approve legislation that will impose appropriate criminal sanctions against any individual or group who would publicly desecrate the American flag.

Do not let this issue become embroiled in lengthy debate or partisan maneuvering. Chose whatever course of action is best for our Nation and our flag, and you will have the support of the Disabled American Veterans.

That concludes my statement, Mr. Chairman.

[The statement of Mr. Heilman follows:]

STATEMENT OF
JOHN F. HEILMAN
NATIONAL LEGISLATIVE DIRECTOR
DISABLED AMERICAN VETERANS
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
September 13, 1989

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

On behalf of the over 1.3 million members of the Disabled American Veterans and its Ladies' Auxiliary, may I say that our organization deeply appreciates this opportunity to participate in today's proceedings.

Mr. Chairman, the recent Supreme Court decision in Texas vs. Johnson, which ruled that public desecration of the Flag of the United States is a legal, permissible form of free speech protected by the First Amendment to the Constitution, has evoked a firestorm of criticism throughout America.

Let me state at the outset the the Disabled American Veterans was and remains deeply offended by this ruling. There is no doubt in our mind that the vast majority of Americans are equally offended.

The American flag -- "Old Glory" -- is our national ensign, a proud and courageous symbol of our nation's precious heritage. As such, it has been carried and defended in battle, revered and cherished by its citizens and viewed as a beacon of hope and freedom by people throughout the world. Since it was first unfurled at the birth of our nation, over one million men and women serving in our Armed Forces have paid the supreme sacrifice -- life itself -- so that the "Stars and Stripes," in all its glory, can snap against an azure sky.

Desecrate the flag? The very idea is abhorrent. Yet in the wisdom of five justices of the Supreme Court, who under no circumstances that we can conceive of would perform the act themselves, it has now been determined that Americans must allow such desecration in order to preserve the right of freedom of speech.

Mr. Chairman, as indicated above, the DAV is in strong disagreement with the Court's decision. We do not believe that public desecration of the American flag, without appropriate criminal sanctions, should be countenanced under any conditions.

This is not to say that we do not recognize or accept the validity and fundamental importance of the debate surrounding this issue. Specifically, can such desecration be prohibited without endangering the Constitutional First Amendment guarantee of freedom of speech? And, related to that question, what is the best approach to take to prevent desecration of the flag? Specific legislation crafted to withstand a Constitutional challenge or an amendment to the Constitution itself?

Regarding the first question, Mr. Chairman, the DAV believes that prohibitions against desecration of the flag are not inimical to the rights of freedom of speech. It is important to note that four justices of the Supreme Court concur in this belief.

We in the DAV are not lawyers. We are not Constitutional scholars and we cannot argue the point as such. But as an organization of veterans, disabled in the wartime service of our country, we can give you our visceral reaction to the Court's ruling. That is, to put it simply, one of stunned disbelief.

Mr. Chairman, there are laws in this country which inhibit or prohibit certain forms of speech, behavior and expression. Witness statutes against shouting "fire" in a public theater, laws against libel and laws prohibiting certain types of public behavior. We ask, in the admittedly unsophisticated manner of a layman, if it is within the framework of the Constitution to prohibit certain forms of speech, expression or behavior deemed dangerous, irresponsible, morally indefensible or otherwise repugnant to the general mores of our society, why is desecration of the flag any different?

Does anyone really believe that the framers of the Constitution intended the First Amendment to serve as a means by which individuals, who do enjoy the unfettered right to express an opinion in both oral and written form, can publicly desecrate a symbol so sacred to Americans that it alone is given the honor of shrouding the mortal remains of those who have fallen in battle?

In 1984, Mr. Johnson and those of his ilk were not arrested for chanting, "America, the red, white and blue, we spit on you." They had the right then and they have it to this day to speak their mind. And if public desecration of our flag is ultimately determined to be illegal, they would still have the right to utter whatever contemptible words they wish. That is freedom of speech.

And we submit that such a freedom is not endangered by prohibitions against behavior, such as burning the flag, which is designed not to communicate a point of view, but rather to incite a violent public reaction.

Mr. Chairman, we call on this Committee and the Congress to quickly and decisively approve legislation that will impose appropriate criminal sanctions against any individual or group who would publicly desecrate the American flag. Do not let this issue become embroiled in lengthy debate or partisan maneuvering. Choose whatever course of action is best for our nation and our flag and you will have the support of the Disabled American Veterans.

This completes my statement, Mr. Chairman. Attached you will find a copy of the resolution, addressing this issue, that was unanimously approved by the delegates to our most recent 1989 National Convention. I again wish to thank you for inviting our participation in these most important proceedings.

RESOLUTION NO. 332
LEGISLATIVE

IN SUPPORT OF CRIMINAL SANCTIONS FOR PUBLIC DESECRATION OF THE FLAG OF THE UNITED STATES

WHEREAS, The U.S. Supreme Court, by a 5-4 decision, has ruled that public desecration of the American flag, as a form of free speech and expression, is legal and permissible; and

WHEREAS, the American flag -- "Old Glory" -- is our National Ensign, the proud courageous and beautiful symbol of our country's precious, free heritage; and

WHEREAS, this symbol, in the form of our irreplaceable "Stars and Stripes," has been carried and defended in battle, revered and cherished by its citizens and viewed as a beacon of hope and fulfillment by the all world since it was first unfurled at the birth of our Nation; and

WHEREAS, the Constitutional First Amendment guarantee of freedom of speech was not intended by our Founding Fathers to enable individuals, who do enjoy the unfettered freedom to express their views, no matter how abhorrent, both orally and in written form, to publicly and contemptuously physically desecrate our beloved flag; NOW

THEREFORE, BE IT RESOLVED, that the Disabled American Veterans in National Convention assembled in Las Vegas, Nevada, July 30-August 3, 1989, support whatever legislation and Congressional action is deemed necessary to restore criminal sanctions for the act of public desecration of the flag of the United States.

* * *

The **Chairman**. Thank you very much. Mr. Hogan.

STATEMENT OF WALTER G. HOGAN, COMMANDER IN CHIEF, VETERANS OF FOREIGN WARS OF THE UNITED STATES

Mr. Hogan. Mr. Chairman and members of the committee, thank you for the opportunity to present the views of the more than 2.8 million men and women of the Veterans of Foreign Wars and our ladies auxiliary with respect to desecration of the American flag, in general, in the June 21, 1989, U.S. Supreme Court decision, *Texas* v. *Johnson* in particular. We appreciate your conducting this hearing on what we in the Veterans of Foreign Wars consider a most serious matter.

The recent Supreme Court decision in *Texas* v. *Johnson* in effect nullified flag desecration in 48 States. Mr. Chairman, upon hearing of the Supreme Court decision, our reaction went from one of disbelief to shock then to outrage.

While our members served overseas, the American flag was the one single symbol that was a constant reminder and link to our Nation and to our home. For this reason, members of the Veterans of Foreign Wars today still hold a very special allegiance to the flag borne out of their service and sacrifice for this great Nation.

Our love for the flag and what it represents is strong and constant and will never diminish. Our outrage at the Supreme Court decision is borne out of the realization that this symbol, our singular identity as a Nation, may not be held sacred, and is now subject to desecration.

Further, this despicable act itself is protected under law. Such a sorry circumstance is not in keeping with the beliefs of our membership, nor is it something our members can tolerate.

Mr. Chairman, this Supreme Court decision has generated much debate. The question that is foremost in the minds of our membership is how to effectively protect the flag from desecration. Considering the Supreme Court's ruling, we believe the only iron-clad way to protect our flag is through a constitutional amendment. Whether or not the Congress can properly craft legislation short of a constitutional amendment to protect our flag remains a matter of conjecture.

We are gratified that Congress is attempting to advance legislation to protect our flag. However, whether such legislation will pass constitutional muster is in doubt since we are not convinced legislation alone will protect our flag. We cannot support legislation which would preclude the constitutional amendment process.

Mr. Chairman, it is for this reason we strongly encourage the Congress to immediately advance a resolution calling for a constitutional amendment so the ratification process by the States may begin. Passage of such a resolution would allow the American people to decide and have their voices heard.

A previously stated, while other recommendations have been brought forth, an amendment to the Constitution would be the most certain action in reversing *Texas* v. *Johnson*. This avenue was in fact overwhelmingly supported by the voting delegates at our recent national convention.

Mr. Chairman, the manner in which we treat the United States reveals much about how we regard ourselves as a free and independent society. We in the Veterans of Foreign Wars, and indeed all this Nation's veterans have made great sacrifices in defense of American principle of freedom. The freedom we enjoy as Americans however can and should coexist with a sense of reverence for the flag and all that it means to us.

We urge the Congress to take the necessary action to protect the American flag in the form of a constitutional amendment.

This concludes my statement, and I would be happy to respond to any questions you may have.

Thank you, Mr. Chairman.

[The statement of Mr. Hogan follows:]

VETERANS OF FOREIGN WARS OF THE UNITED STATES

THE COMMANDER-IN-CHIEF

STATEMENT OF

WALTER G. HOGAN
COMMANDER-IN-CHIEF
VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE

COMMITTEE ON JUDICIARY
UNITED STATES SENATE

WITH RESPECT TO

DESECRATION OF THE U.S. FLAG

WASHINGTON, D. C. SEPTEMBER 13, 1989

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to present the views of the more than 2.8 million men and women of the Veterans of Foreign Wars and its Ladies Auxiliary with respect to the desecration of the American flag, in general, and the June 21, 1989 U.S. Supreme Court decision: Texas v. Johnson, in particular. We appreciate your conducting this hearing on what we in the VFW consider a most serious issue.

On June 21, 1989, in a sharply contested 5:4 decision, the U.S. Supreme Court ruled that protesters who burn or desecrate the American flag are protected under the First Amendment. This decision in effect nullified flag desecration laws in 48 states. The facts of the Johnson case are by now known to all of us. Johnson, a protestor at the 1984 Republican National Convention, unfurled an American flag, which had been removed from a flag pole, soaked it in kerosene and deliberately set it on fire. He was then arrested and charged with desecration of the flag, a crime under Texas law. Johnson was thereafter tried, convicted, fined and sentenced to one year in prison. His conviction was upheld by the Court of Appeals of the 5th

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District of Texas. However, the Texas Court of Criminal Appeals reversed the decision stating that the states could not, consistent with the First Amendment, punish that individual. The U.S. Supreme Court agreed with the Texas Court of Criminal Appeals.

Mr. Chairman, upon hearing the decision of the Supreme Court, our reaction went from disbelief to shock to outrage. While our members served overseas, the American flag was the one single symbol that was a constant reminder and link to our nation and home. For this reason, members of the VFW today still hold a very special allegiance to the flag borne out of their service and sacrifice for the nation. Our love for the flag and what it represents is strong and constant and will never diminish. Our outrage at the Supreme Court decision is borne out of the realization that this symbol, our singular identity as a nation, may not be held sacred and is now subject to desecration. Further, this despicable act itself is protected under law. Such a sorry circumstance is not in keeping with the beliefs of our membership nor is it something they can tolerate.

Mr. Chairman, this Supreme Court decision has generated much debate. The question that is foremost in the minds of our membership is how to effectively protect the flag from desecration. Considering the Supreme Court's ruling, we believe the only ironclad way to protect our flag is through a constitutional amendment. Whether or not the Congress can properly craft legislation, short of a constitutional amendment, to protect our flag remains a matter of conjecture. We are gratified the Congress is attempting to advance legislation to protect our flag; however, whether such legislation will pass constitutional muster is in doubt. Since we are not convinced legislation alone will protect our flag, we cannot support legislation which would preclude the constitutional amendment process.

Mr. Chairman, it is for this reason we strongly encourage the Congress to immediately advance a resolution calling for a constitutional amendment so the ratification process by the states may begin. Passage of such a resolution would allow the American people to decide and have their voice heard. As stated previously, while other recommendations have been brought forth, an amendment to the constitution would be the most certain action in reversing Texas v. Johnson. This avenue was, in fact, overwhelmingly supported by the voting delegates at our most recent National Convention.

Mr. Chairman, the manner in which we treat the U.S. flag reveals much about how we regard ourselves as a free and independent society. We of the VFW and indeed all of this nation's veterans have made great sacrifices in defense of the American principle of freedom. The freedom we enjoy as Americans, however, can and should co-exist with a sense of reverence for the flag and all that it means to us.

We urge the Congress to take the necessary action to protect the American flag in the form of a constitutional amendment.

This concludes my statement and I would be happy to respond to any questions you may have.

The CHAIRMAN. Thank you very much. Mr. Powell.

STATEMENT OF R. JACK POWELL, EXECUTIVE DIRECTOR, PARALYZED VETERANS OF AMERICA

Mr. POWELL. Thank you, Mr. Chairman. If I may, I will submit our testimony for the record.

The CHAIRMAN. Without objection, it will be placed in the record.

Mr. POWELL. Thank you, sir.

Seventy-four years ago, President Woodrow Wilson said on Flag Day, and I quote, "The flag is the embodiment not of sentiment but of history. It represents the experiences made by men and women who live under that flag. The flag is a symbol of all the rights and freedoms guaranteed under our constitution."

I am concerned that there is some impress, at least in the media and by some others that are around, that the idea of supporting the flag is some idea just of right-wing conservatives, and I have heard some Senators say, "Those veteran organizations," and that kind of thing.

In fact, the flag is the symbol of a constitution that allows Mr. Johnson to express his opinion. So, to destroy that symbol is again a step to destroy the idea that there is one nation on earth that allows their people to express their opinions, whether they happen to be socialist opinions or neo-Nazi opinions, or democratic opinions or republican opinions.

Certainly, the idea of society is the banding together of individuals for the mutual protection of each individual. That includes, also, an idea that we have somehow lost in this country, and that is the reciprocal, willing giving up of unlimited individual freedom so that society can be cohesive and can work. It would seem that those who want most to talk about freedom ought to recognize the right of a society to say that there is a symbol, one symbol, which in standing for this great freedom for everyone of different opinions, different persuasions, different religions, and different backgrounds, society puts beyond the pale to trample with.

The Paralyzed Veterans of American at their recent convention passed a resolution, resolved that PVA support and promote any congressional efforts, including an amendment to the U.S. Constitution, if necessary, which will make it unlawful to desecrate the flag of the United States of America. We support the passage of Senate bill 1338, and to the extent that it is necessary, we support the passage of a constitutional amendment.

Speaking personally, I do not believe that in 100 years or in 200 years this society has become more ignorant than it was 200 years ago. If 200 years ago we could write a constitution and a bill of rights, if a 100 years ago we could amend it, there certainly must be still in this Nation the wisdom and the perseverance to be able to change a constitution.

When I was in school in government, we were taught that the most wonderful thing about the Constitution is it is a living document. All living things change. You stop changing when you die. I certainly hope our Constitution isn't dead.

As for the definition of what is desecration and what is not, we seem to have a large number of laws around this country dealing with pornography, and I seem to remember one of the most frequently quoted statements that came out on pornography was, I do not know how to describe it, but I know when I see it; and I would imagine that we can say that is true about desecration of the American flag.

Thank you, Mr. Chairman, members of the committee, for your time. I will try to answer any of your questions.

[The statement of Mr. Powell follows:]

PVA

PARALYZED VETERANS
OF AMERICA
Chartered by the Congress
of the United States

STATEMENT
OF
R. JACK POWELL, EXECUTIVE DIRECTOR
PARALYZED VETERANS OF AMERICA
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
REGARDING
S. 1338, TO AMEND TITLE 18, UNITED STATES CODE
TO PROTECT THE
PHYSICAL INTEGRITY OF THE FLAG
OF THE UNITED STATES OF AMERICA
SEPTEMBER 13, 1989

Mr. Chairman and Members of the Committee, on behalf of the members of Paralyzed Veterans of America (PVA), a Congressionally chartered veterans service organization, I appreciate your invitation and the opportunity to appear before you today. It is a pleasure for me to present PVA's views concerning the protection of the physical integrity of the flag of the United States and the "Biden-Roth-Cohen Flag Protection Act of 1989."

801 Eighteenth Street, N.W., Washington, D.C. 20006 (202) USA-1300 Fax: (202) 785-4452

Mr. Chairman, the recent Supreme court decision in Texas vs. Johnson ruled that public desecration of the flag of the United States, as a form of free speech, is protected by the First Amendment to the Constitution. One can agree or disagree with that decision, but the fact remains that the highest court in the Land has spoken. The Congress, now, also under the Constitution, has the opportunity to react to that decision as elected representatives of the American people.

The Supreme Court's action angered and, in many ways, confused many Americans. We must deal with that anger and confusion, as well as act swiftly to restore protections for the physical integrity of the flag under the law. We must also make certain that in protecting the flag, we do nothing to erode or undermine the Constitution for which it stands.

The twenty-eighth President of the United States, Woodrow Wilson, in an address on June 14, 1915, (Flag Day) said:

> "The flag is the embodiment, not of sentiment, but of history. It represents, the experiences made by men and women ... who...live under that flag."

The members of Paralyzed Veterans of America, all of whom have incurred catastrophic spinal cord injury or dysfunction, have shared the ultimate experience of citizenship under the flag: serving in defense of our Nation. The flag, for us, embodies that service and that sacrifice as a symbol of all the freedoms that we cherish, including the First Amendment right of free speech and expression. Curiously, the Supreme Court in rendering its decision could not clearly ascertain how to determine whether the flag was a "symbol" that was "sufficiently special to warrant ....unique status." In our opinion and from our experience, there is no question as to the unique status and singular position the flag holds as the symbol of freedom, our Constitution and our Nation. As such it must be defended and provided special protection under the law. We believe the Congress has the right and the opportunity to accomplish that goal as expeditiously as possible.

Mr. Chairman, the Board of Directors of Paralyzed Veterans of America during our August, 1989 Annual Convention passed the following National Resolution by acclamation:

> THEREFORE BE IT RESOLVED, THAT PVA SUPPORT AND PROMOTE ANY CONGRESSIONAL EFFORTS, INCLUDING AN AMENDMENT TO THE U.S. CONSTITUTION (IF NECESSARY) WHICH WILL MAKE IT UNLAWFUL TO DESECRATE THE FLAG OF THE UNITED STATES OF AMERICA.

Mr. Chairman, at this direction, PVA is pleased to express its strong support for passage of S. 1338, "The Biden-Roth-Cohen Flag Protection Act of 1989," as introduced.

If enacted, should this statute be challenged in the courts and that challenge upheld by the Supreme Court, we would equally support any additional Congressional efforts to modify the intent of such a decision up to and including an Amendment to the United States Constitution to be ratified by the States. However, facing that situation as a last resort, we prefer to defer to the expertise of the Congress at this point to craft a legislative solution that can withstand such a challenge and provide legal protection for the physical integrity of the flag in what we believe to be the most expeditious manner possible.

Ironically, but realistically, no law or even Constitutional Amendment can provide full protection for the flag. No matter what the penalties prescribed by the Congress for flag desecration, there undoubtedly will be individuals, as there have been in the past, so misguided, disillusioned or demented, willing to risk any penalty or punishment in performing this act. In reality, the flag is protected by its cherished status in the hearts of the vast majority of all Americans and our mutual outrage, horror and disgust when such an event takes place. This is as it should be. An act of flag desecration quickly loses its message when the atmosphere of respect and reverence for our national emblem is strong and alive throughout the Nation.

In this respect, the Supreme Court decision has provided an excellent opportunity for all of us to reaffirm our commitment and allegiance to the flag. We can disagree with the Supreme Court, but the Court's action has also served to instruct millions of Americans on the Constitutional rights, including free speech, that have sustained our Nation for over two hundred years, keeping America both strong and free. The flag represents these freedoms as well.

In the end, however, we are a Nation of laws. The Constitution, and the flag it represents, also empower the Congress through the passage of laws to represent the collective will of the American people. It is our intention and, we believe, the collective will of the vast majority of Americans to see the Congress act swiftly to provide legal protection for the physical integrity of the flag and sure and swift punishment through the courts for anyone found guilty of desecrating this cherished national emblem.

Mr. Chairman, on behalf of the members of Paralyzed Veterans of America, I would like to thank you and the Members of this Committee for conducting this hearing today. We would like to express our sincere appreciation for your previous and on-going efforts to see that the flag of the United States of America receives the protection and the honor it deserves. I will gladly answer any questions I can.

The CHAIRMAN. Very well said.

Ms. Stout, welcome.

STATEMENT OF MARY R. STOUT, NATIONAL PRESIDENT, VIETNAM VETERANS OF AMERICA, INC.

Ms. STOUT. Thank you. Mr. Chairman, and members of the committee, I really appreciate the opportunity to represent the membership of Vietnam Veterans of America and to speak with you about the important and timely subject of flag desecration.

This is really the first opportunity that Vietnam Veterans of America has spoken on this issue publicly because when the Supreme Court's decision came out, neither our Constitution nor our resolutions had clear guidance as to the will of our membership concerning the desecration of the American flag or first amendment rights. At that time I wrote to every chapter and talked about what was going on and asked them to discuss their feelings about this issue, and at our national convention on August 3-6 of this year, our delegates addressed this issue in very clear terms. They overwhelmingly approved your resolution, which is attached to our written statement, supporting statutory criminalization of flag desecration.

It is clear from our members, and we believe the general public, that they view flag desecration to be so egregious, so politically unacceptable, and so dangerously inciteful that punishment must be imposed. Our members were, however, thoughtful enough in their consideration of a remedy to distinguish their desire for punishment from the risky business of tinkering with the constitutionally guaranteed right of free speech. Mr. Chairman, we believe that these are really the sentiments of the American public when they've expressed their opinions in the opinion polls.

Opinion polls are imperfect because not enough information is there. I am always pleased to come, particularly to congressional hearings on very difficult issues, because I learn so much from both sides about what the issues are and how we can resolve them. Most Americans were, as we've all discussed, rightfully indignant at the Supreme's Court's decision, very concerned.

The question, here, is how to respond to that concern. It is an emotional response that the American public have, but you, as Members of Congress, must overcome that emotional response to determine how best can we approach this issue, and assuming, for the moment, that this committee and the Congress will ultimately conclude that a statutory remedy is the most appropriate course of action, the question of what to do in the event the Supreme Court overturns the statute remains; and that's the question here, or do we move on? And I know we are going to be asked, will you accept a constitutional amendment.

According to the membership of our organization, we will say to the Congress, please go back and do it again. Redo the legislation until the Supreme Court relents.

Mr. Chairman, this is a very serious issue, one not to be taken lightly, and one deserving a very careful consideration before rushing headlong toward a remedy that could very well curb, in a very substantial way, our society's fundamental rights of free speech.

In that regard I want to share with you a booklet that we just received yesterday from our chapter in Concord, New Hampshire, chapter 41. When I wrote the letter, the chapter—and probably before I wrote the letter—the chapter started discussing this issue and how they felt about our flag, and they put together their comments, they recorded them at a meeting in a book called "Respecting the Flag." It also contains the Pledge of Allegiance, the Bill of Rights, and the flag code; and I want to quote to you from a letter that accompanied this flag——

The CHAIRMAN. Ms. Stout, would you mind if one of the staff got that book and sent it up while you are talking, unless you are going——

Ms. STOUT. Yes, I would like to have it put into the record, if possible.

The CHAIRMAN. It will be placed in the record.

Ms. STOUT. OK. The letter that accompanies this book states, and I quote:

> The comments of our members speak for themselves, but I would like to point out that while most of us voice sincere visceral antipathy toward flag burners, there appeared to be little support for a constitutional remedy and strong sentiment for protection of the First Amendment, even at the cost of a few flags. Buzz Gagney may have summed it up best, "if an individual wants to burn a flag if I'm around, he's got to pay the consequences, and I will pay the consequences for what I do." I think this booklet demonstrates that opposition to a constitutional amendment is compatible with sincere patriotism.

And I do ask that this booklet from our membership be placed as part of the hearing record.

The CHAIRMAN. Without objection, it will be.

[The booklet of Ms. Stout follows:]

Respecting the Flag

by

Chapter #41
Central New Hampshire
Vietnam Veterans of America

Respecting the Flag

Respecting the Flag was prepared in August and September, 1989 by Chapter #41, (Central New Hampshire) Vietnam Veterans of America. Founded in 1979, Chapter #41 is one of VVA's oldest continuously active chapters. This is our response to the Supreme Court ruling declaring flag burning a protected form of free speech.

Chapter #41 held a regularly scheduled meeting five days after the announcement of the court ruling. Routine business was disposed of as soon as possible so the floor could be thrown open for discussion of the court's ruling, proposed constitutional amendments, and related issues.

In our ten-year history of wide-open debate, the next four hours were the most heated. Every one of the twenty members present spoke against flag burning as a means of protest.

But we could not agree on a proper response to the court ruling.

Many members favored amending the Constitution to prohibit flag burning. A substantial minority objected to an amendment, saying the risk of limiting free speech was more of a danger than flag burning.

We did find two things on which we could all agree:

(1) our country could stand more education on proper use and care of the flag, and

(2) we wanted an opportunity to speak to the issue fully.

Therefore, at our next two meetings, we held open recording sessions. Each member had five minutes to speak their piece.

We still have not taken a position on a constitutional amendment. Instead, as a token of our respect for, and allegiance to the flag, the United States of America, its Constitution and Bill of Rights, we produced this booklet. We offer it to our representatives in government, the people of New Hampshire, and Americans everywhere.

The Pledge of Allegiance

I pledge allegiance

to the flag

of the United States of America,

and to the Republic

for which it stands,

one Nation

under God,

indivisible,

with liberty

and justice

for all.

Respecting the Flag

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Respecting the Flag

Jeannie Mercer:

I have mixed feelings. As a citizen of the US, I don't think we have the right to say that we can't burn the flag. As a patriot, as a veteran, I don't want to see it done.

I don't think that we, as a nation, have the right to say "you have the freedom of speech," or the freedom of individuality, or of protest, if you can stop them. But I don't like to see it happen.

The flag stands for something. It stands for a lot. It stands for the blood and guts that everybody in this nation, one way or another, has had to spill, give up, or hold in in order to keep the US what it is.

But if we have to make a law saying "no, you can't express your freedom that way," what's to stop them from censoring us from doing other things?

That I have difficulty with, because that's censorship. And that's going against what this country was based on.

I guess that's all I have to say.

Joe Francis:

I would try to stop them in some way if possible. If I couldn't...

Bill Clothier:

How do I feel about the flag being burned? A lot of it has to do with how I feel about the flag itself.

Like nearly anyone who has stood for a certain purpose, who has done his best, who stood up for his country at a time when it was difficult for people do that, I feel very strongly about the flag.

And I have very strong feelings against individuals who would desecrate it in any way, whether it was burning it, stomping on it, dragging it, or treating it in any undignified reason, in any undignified fashion.

A deeper understanding about the flag puts my feelings in perspective, however.

Respecting the Flag

I feel the flag is a great symbol. Its cloth represents to me something that is very common to all of us: the fact that together together we share in something great, something beyond ourselves: we are all Americans. We have a common purpose, we have a common dream.

The flag is a visible symbol, manifest evidence that we are one people. I do not believe however, that the flag can ever be greater than that which it represents. It's a dream, it represents an America that can be, but which is always in doubt, always in contention.

It represents the fact that someone can stand up and be very different. Someone can stand up with a differing opinion from everyone else, even the mass of people, and be heard. Maybe you don't like what the person has to say, maybe you disagree with them strongly, but the right of that individual to speak out, to take variance, and to seek redress through our system of laws is what the flag symbolizes. The flag being just the symbol, but the laws being the guarantee.

At Thermopylea a number of Spartans stood against the Persian army. When they died they didn't rally around a flag. Each man there said "Stranger, go tell the Spartans that we lie here obedient to their laws." It wasn't obedience to their flag, it was to their laws.

I think of the flag as a great, very moving symbol, but only the symbol of the guarantee that an individual, apart from the mass, has certain rights which are guaranteed. .

I think that's the ultimate challenge of what the flag is all about. I haven't read the Bill of Rights for some time. I think I'd like to, just for my own self, remember the Bill of Rights. I wish, sometimes, people had as much feeling and passion about the Bill of Rights, and the rights of individuals, as they are about the flag, which represents the state that represents the dream that we're all a part of. Now I'm finished.

Respecting the Flag

Jim Pinfield:

On the subject of flag burning, I'm not going to get into ideals. I think everybody here has their own opinions of what the flag stands for. I know I do, I know everybody else does, you ask anybody and they'll give you a different answer. But if you're going to burn the flag, I think it ought to be in the privacy of your own home. Just like smoking marijuana. If you want to do that in the privacy of your own home, nobody stops you from doing that. I just hope your house burns down.

Pete Morse

I was raised, like a lot of the people in here, to respect the flag. It is a symbol of the United States, and it stands for everything the United States is for. As a symbol, just like many symbols we have in this country, like monuments, and papers that say "We the people," it should not be desecrated, it should not be burned, it should not be stomped on or used for political reasons.

After all, this country was founded on these beliefs: that you have the right to speak, say what you want to say, and what you want to do.

But you can carry points a little too far, just like going out and shooting somebody. It doesn't give you the right. Doesn't give you the right to destroy an American symbol, or a monument.

Too many people that have died and gave their lives for it. We've all seen that. As soon as we raised the flag in a foreign country, we got the heat and a lot of people died.

A lot of these people that are burning flags in this country never once served in a war, never fought. If they did then they would know what it means to burn the flag. It's not a right. Nobody has the right, that's my belief. And I hope that they do pass a law and put these people in jail. I guess that's all I have to say.

Respecting the Flag

Bob Graves:

As a Vietnam veteran; feeling what I feel about the flag, and what it stands for:

When I went to Vietnam, people were burning flags. I was opposed to it.

When I came back from Vietnam, people were burning flags. I was still opposed to it.

People were placed under arrest at that time, and were treated by the judicial system as I deemed appropriate at that time.

Now, or any other time, when a veteran is buried...you go to the cemetery, a veterans funeral...the last thing that family's handed is the American flag. That's how these people remember their loved ones when they're buried, by the American flag.

If you allow people to burn the flag as a symbol of speech, you might just as well allow them to go blow up the Statue of Liberty, kill the bald eagle, destroy the Vietnam Veterans Memorial.

Why should one person in a communist organization be allowed to burn the American flag and get away with it? Everybody says it's freedom of speech. I could sit here and rant and rave and say all I want to say about the American flag, or about anybody in here, or anybody in the American government, without having to kill them, hurt them, or burn the American flag.

I could say I don't like the flag, I'd like to see a different flag. I could say what I want, and get away with it. I don't have to burn the flag to prove my point.

I just feel that I'm opposed to it as far as allowing one person to cause all these feelings for all the rest of the Americans. I guess that's what I have to say. I just don't want to see anybody burn the flag in front of me. That's all.

Respecting the Flag

Brian Swenson:

I'm a Vietnam vet. I have mixed feelings about it also.

Everybody's hollering about civil rights, but I don't hear anybody talking about their responsibilities.

When you are living in this country, you have a responsibility to treat it, and your government, with respect. That's the basics of it right there.

I had a responsibility, along with the rest of them. And like all the rest of them, I just don't want to see anybody burn the flag in front of me. Plain and simple.

Gary Gordon:

Like most people who have talked already, I have mixed feelings. I was raised in a family that was taught respect for the country, for what it stood for, and what it continues to stand for.

One of the things that bother me about desecration of the flag is what's going to happen next? Are they going to say, as it's already been said here tonight, that it's allright to destroy the Washington Memorial? The Lincoln Memorial? The White House?...for freedom of expression?

When I see friends, relatives, and comrades in arms come back to this country in a box, I see flags on their coffins. And I can't, in my own mind, equate the freedom of expression with what those symbols stand for on the coffins.

However this country does stand for freedom. All kinds of freedom. And if we can't give those freedoms, then something is wrong. I think the best thing that can be done is to educate people as to what the flag does stand for: what it means.

It's not just a piece of cloth with some red and white and blue on it. It is a symbol, and that symbol stands for the Constitution, the Bill of Rights, and more basic than that, the freedoms that we enjoy.

However, to get those freedoms, we've had to fight for them. And to fight for them, we've had to have a cause, and a symbol to stand for those causes. That symbol is the flag.

So the improper use of the flag, or the desecration of it, to me, personally, is wrong. And I won't hold with anyone who has not earned the right, by standing for those freedoms, to do anything to the flag. That's it.

Vern Mitchell:

I'm a Vietnam veteran, and I'm also a Cub Scout and Boy Scout leader. I learned when I was real young (and it was taught to me by everybody, I was brought up to it) "I pledge allegiance to the flag of the United States of America, and to the Republic for which what it stands..."

Let's think about that for a while. Somebody ought to read that, and say it more often than they do today. It means a lot to some, and I guess it don't mean too much to other people.

Even my Cub Scouts and Boy Scouts won't let anything happen to their flag. They always salute it, they always take care of it, and you ask any one of them if they're not proud. And any one of them will tell you what it stands for.

So what are we supposed to tell them, our children? That after what we taught them, now it's OK to burn it now? Forget everything they've learned about the flag?

Even though they're educated, they're not going to be able to understand it. To me, burning the flag is a great desecration to all of us in the United States.

In Vietnam, you really didn't know why you were there. Maybe some of us thought we were told to do it, maybe some of us believed in it, and a lot of us thought we shouldn't even be there. But however our thoughts were, nobody, to my knowledge, ever thought about burning the American flag.

Some nights when you're sitting lonely up there, wondering if the next day you're going to live or not, you get a newspaper from home, and you read about sitdown strikes, burning the American flag...it made some of us feel real lonely. Really, really lonely. A lot of you know what I'm talking about.

I just don't think it's right. We have to believe and stand for something, and that's one of the greatest symbols in America. That's what anybody coming over here sees first, or hears about: the American flag. They all know what it looks like. And they all know what it stands for. So, all I can say is, I don't want to see anybody burning my flag. That's all I have to say.

Steve Fowle:

Rather than addressing America at large, I'd like to direct my comments to those here in this room. I get to address America all the time. That's my job, that's how I make a living: I'm a writer.

No one pays you to express yourself. That's just the way it is. Someone may stick a microphone in your face now and then, but they're the ones that determine what you say. Here's how they do it: You talk five minutes, they play thirty seconds. *Their* thirty seconds. They pick, out of that five minutes, all you're going to get to say.

And they get to ask the questions. They own the mike, the video cameras. I've worked for newspapers, they're the same.

I've had newspapers ask me questions, now I've got some questions. Like whose side are they on?

By "they," I mean the newspapers, and the other businesses, radio and tv, that pretend to be something called a "news medium." What the hell is a "news medium"?

I'd like to quote the First Amendment here:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

Respecting the Flag

I grew up with this stuff, that's the way it is here in New England, and that gave me the sense, which I'm sure is unauthorized, that I have some right to a piece of it.

The First Amendment goes on to prohibit Congress from "abridging the freedom of speech, or the press, or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

My primary concern is that we, as Vietnam veterans in particular, do not give up this particular part of the Constitution. The Constitution we fought for, or that we are *told* we fought for.

We veterans have homes but we're no more heard than the homeless. And a lot of the homeless are veterans. A lot of us here have been closer to homelessness than we like to remember.

If our war wasn't a complete charade, it was a bungle, and the aftermath has been no improvement. We are now offered a draft-dodging nitwit as a hero and alternate commander-in-chief, but we are not heard.

The cameras are on us on the Fourth, and Memorial Day, and perhaps even Veterans day, but we are not heard.

The country looks around for leadership, but we are not heard.

We will be heard.

The same system that sent us to Vietnam and let us find our own way home acts as if, if we care at all about America, we must be nuts. That system is working, working. Still working on that line. I am not a happy, satisfied camper, here in the land of the home, free of the brave.

And this is not a good time to throw away free speech.

We were split off years ago and we've been kept "out of the loop," because that's the way "The System" works.

Not the system of the American Constitution, which was about the Executive, Legislative, and Judicial power. No. "The System" now seems to be about defense contractors and budget deficits, high taxes, and the inability of the government to help anyone but the rich or, tax anyone but the poor.

And the richest, the hottest industry going, is the industry that provides us with fashion reports on the Emperor's new clothes. Time buys Warner buys God knows who next. TV networks are just another franchise in the Big Racket. If it's big, and it's a corporation, there are a handful of rich bastards running the whole setup. It's that simple. It always has been. The media's function is to keep us confused so we can't rock the boat for them and their buddies.

As I said, I'm a journalist. Obviously I'm not satisfied with the way the commercial media have been doing their job. I intend to create a newspaper that serves democracy instead of "The System." And I'm going to need all the First Amendment I can get. Thanks.

Ken Leidner:

As much as everybody is scared shitless that I'm going to flip out again, I'm not going to. There are a few points to make.

First, much as I hate to admit it, I agree with Gordon Humphrey, Senator from New Hampshire, about the silliness of this issue.

What does this issue do for the people? Does it feed the hungry? Does it house the homeless? Does it promote civil rights for everybody in this country?

I say no. I say it's a sham. It's another button-push.

I'm confused over free speech being extended by the court to mean free expression, and I'm not sure...

I don't know if I have the wisdom to say there is a difference between freedom of speech, what our forefathers thought of it, and the freedom of expression.

But I question, then, what is desecration? Is desecration just the physical burning or altering of the flag? What about the commercial and political aspects of desecration? Is it not desecrating to put up a flag in front of a Burger King? Have we stooped to the point where politicians need the flag to wrap themselves in? To use the "I'm more patriotic than you?" to get elected?

But more important, I think, that there are two issues here, two very separate issues. What is it that has created this furor? Is it the burning of the flag itself? Because if that's what it is, I agree. I'm just as mad as everybody else, and I'll stop it if I see it.

Or is it the Supreme Court's decision? Which is supposedly based on logic and the legal tenets of our country?

If all this anxiety is over their decision, then (one,) we've got to stop and think. Because that's what this country is based on. And (two,) the laugh is on all the Reagan lovers. Because Reagan stacked that court, and those are conservative people that made that decision.

I wish I could explode, at least it would break a little of the tension around here. But it's all sort of gone by-the-by now. I think that what we're doing here is probably the most positive thing that could ever come out. We're letting our opinions be aired, which is what the whole thing is about. And from that, hopefully, with the other things that people are going to find in this little booklet, we're going to educate people. Because that's what we need.

We need education.

Charles Marco[illegible]x

I'd shoot the whole five of them that voted it in, like that. Because you've got...

I don't know if anybody knows where the cemetery is in Bow. Does anybody know where that is?

[Right up there.]

Well, right now there's one bastard that's buried up there that had a [flag] patch on his ass, and I'm glad to see right where he's at, right now. If any of you feel like going up there, if you want to piss on somebody's grave, I'll tell you, he's in the far corner on the right. Because me and another guy, they held us back, our crew held us back, because we were doing to do that son-of-a-bitch in.

You know him? Well, that son-of-a-bitch got what he deserved. He's resting in peace, right now.

I feel they Vern does. Same way.

I see a bunch of them walk into the IGA store down there. I think there's about eight or nine of them; filthy, dirty, rotten-looking hippies. And about three of them had the patch on their ass. But I didn't dare to do nothing then. Because, like I said, blood don't faze me one god damned bit. I've seen too much of it. And that's...

I get like him. I get...I get burned up over it, and that's why I don't want to say too much. That's why I didn't say nothing the last time you guys were about it. Because I feel like he is. I could probably end up in jail. That's my opinion of it.

I've seen too many people die for that flag. Vietnam and Korea. And like I said, blood don't hurt my feelings one bit. As long as it ain't mine.

Mike Little

Since the last time that we really went over this issue (and listening to Charlie kind of puts me in a little bit of different frame of mind) I've thought about the flag as a symbol, and I guess that there's a symbol, the flag, and then there's a reality, the flag.

It's a different distinction, to decide whether you're going to go for the symbol or the reality. The reality of the flag is the piece of cloth, and that's what the Supreme Court said that somebody has the right to burn. It is supposedly First Amendment, which is the same, I suppose, they could burn the stuff on the wall here, as long as they don't burn the building down, they can burn the stuff on the wall.

The flag has a representative stature to the country and the people who've fought for it, and that's where the problem lies. That's where the intense feelings that Charlie has, that Vern has, and a lot of people in this room have, on either side of the issue, comes up. And I guess that's what we've got to be careful of, is that this country rallied really hard behind something that's so easy to destroy: a piece of cloth.

And we went nuts over it, we really did. I mean, we've got a Congress, we've got a President, we've got a Senate, we've got all these people trying to get bills in....we've got a government rules committee of the Congress of the United States that's been tied up in this for four weeks of really fighting over this issue.

And what they passed won't do a god damned bit of good. Nothing. It's not worth a shit. And you've tied up people making $80,000 a year, ten of them, plus a staff, plus all the people behind it, to pass something that's absolutely worthless.

It's like the Tonkin [Gulf] Resolution. It's all debated, the issue's all debated, and "let's go do it," but it's not going to accomplish anything.

The reality is, I think, we've got to look at the flag and say it is what each one of us believes it is. What each one of us backed it up for, and what we believe we'll go forward for.

There are issues that that flag stands for that I'm not always a hundred percent comfortable about. I'm not a hundred percent comfortable when I go through Washington DC and I see people living in squalor. I'm not a hundred percent comfortable when I see homeless people. And yet that flag represents those homeless people, too, and people that don't have anything to eat, or money, or whatever, OK?

I'm not going to stop and, I mean, you know, I'm not going to stop my car and jump out. It's not my responsibility, I feel, to personally get out and attempt to do those things. But as the country that flag represents, we all have a collective responsibility to go forward, and attempt to solve these problems that that flag stands for.

Respecting the Flag

One of those problems is what we perceive happened because of the issue of the flag in the sixties. The issue of the flag in the sixties is what we're reliving. We're reliving the sixties right now, whether anybody happens to believe it or not. We're reliving the 1960's today; in cars, in music, in childrens' attitudes, in everything you can think of. The sixties is being relived right now.

And what we went through was a huge disparity. There were people who said the flag was the next thing to God. And that's what we did. People who marched forward, went and served in Vietnam and everything else. You came back, and a lot of people took a different direction. They went "Whoah, wait a minute. That flag doesn't represent what I left thinking about. I've come back with a different attitude. That flag does not necessarily represent it." Other people came back and stayed with the course of "That flag is eveything it should be." And I'm one of those people, I came back, hundred percent down the line. I mean I... with Mel Thomson, and Richard Nixon, the whole god damned shooting match, right down the line, OK?

I question that a little bit now. Maybe it's just age that allows you the latitude to do it, but I question that, and I think each one of us questions it, as strong as we believe in whatever we do, we question little parts. And that's where the issue of the homeless came in, and the issue of food and things like that. I realize that there are parts of our flag that we are not necessarily a hundred percent proud of.

But there are parts of it that we are a hundred percent proud of. And all the Supreme Court of the United States did was give the distinction of saying that the flag itself, the physical piece of cloth, is no more of an entity than a piece of paper. But, at the same time, it allows us to believe that that – what the flag stands for – is what we're all standing back of.

I think that...I think they erred. I don't agree with the issue of being able to burn the flag, as just an issue. As a symbol of something to destroy, supposedly to make a point, maybe it should allowed to be burned. But it would have to be for something very, very important. It can't be just a frivolous attitude of turning it upside down and burning it. And I don't agree with wearing it on the seat of the pants. I don't agree with desecrating the flag, putting it on the ground, stomping on it, like that guy walking on it. But actually burning, physically starting it on fire for some reason, to destroy an entity, for making a point, is the only issue that we have to deal with. And that's the issue that the Supreme Court ruled on. I don't know. Maybe I'm all wrong. Thanks for the time.

Buzz Gagne:

I see the emotions running high here, again. As a bunch of veterans I think as a group we're probably more patriotic than Joe Sixpack, who's never been in the service, never fought, never got shot at. And, to see your friends die and everything is one thing, but that doesn't bring on patriotism.

You have to think back, now, that the person who brought up this uproar was a young gentleman (I use the terms loosely) who was trying to get media coverage. And he was a member of the Communist Party of the United States. He succeeded in what he wanted to do. It just seems kind of strange that one individual can claim so much publicity, and the emotions that run with it.

I believe America is great for what it is, because we have the ability of an individual like this to speak his mind. I don't think the Supreme Court was wrong in what they did, and I disapprove of the way they voted, but I don't want to see any erosions of my rights. And his rights. That's what makes America great.

And the flag is a symbol, and if an individual wants to burn the flag, well, if I'm around, he's got to pay the consequences, and I will pay the consequences for what I do. That's all I have to say.

[At this point John Jones indicated that Buzz Gagne's comments spoke for him as well.]

Respecting the Flag

Larry Cassin

Ever since I can remember, probably when I was in the first grade, we would say the Lord's Prayer. Afterwards we would all put our hands over our hearts and say the Pledge of Allegiance to the Flag. I was, as well as all my classmates, taught about respect. Through the grades and the years, I was learning what and how our country came to be what it is today. I learned about the Constitution, and what it means and how it was formed. I learned about how the American Flag was made and why it was made. That American Flag to me represents what the Constitution says.

I would watch a lot of movies when I was young, especially cowboys and Indians, combat movies of World War I, II and Korea. It always would catch my attention when the flag would fall to the ground and to my surprise someone would always pick the flag back up so that it would fly once more. People died just so that flag would fly. That showed me their feelings of what this country meant to them.

I went to Vietnam, I think, for the same reasons a lot of my buddies did. I wanted to protect and preserve all the things we as Americans cherish. While I was there I wanted to be the very best that I could be, both for my country and especially for the loved ones I left behind.

When I came back from the 'Nam I too was very disillusioned, like a lot of my buddies. I also disapproved of a lot of things that my country did, and continues to do to its people.

Look what the American eagle means to the American people. You protect the eagle, not just for the fact that it's an endangered species. I really do not know how to describe it...but that eagle, its gracefullness, its beauty, the freedom, maybe its power...to me its a national treasure. That's what the American Flag is as well, a national treasure. You do not destroy a national treasure.

When an individual destroys or desecrates a national treasure, monument, etc., then there becomes a morale problem in our country, as well as lack of respect to others that feel so strongly about preserving these national tereasures, monuments, etc.

If an individual wishes to disagree, or if he or she wants others to take note on an important issue that they want to express, they have that right in this country, and I do not believe anyone would stop them from expressing themselves if they would do it in a proper and legal way.

I hate to admit it, but it seems as though each generation that goes by, things such as respect for one another, responsibility, morals...these things just are not as important as they once were.

As a veteran, when things like this happen, it sometimes is very hard to control one's feelings. It becomes an emotional problem maybe because of buddies you lost in the war or because of what happened to that individual that served in that war or any war. To a lot of vets a situation like this creates a lot of hate, and pain. It's a gut type of pain as well as in the heart for us who do care.

This individual should consider himself very fortunate. He would not have done what he did to the flag in Texas, if he had tried it in Concord, NH. It just would not have happened. Not in public anyway.

I often wonder what people from other counties think when they see something like this happen in the United States. It's been my experience while travelling to other countries, how everyone wants to be just like an American. They want to wear what we wear, they want all the possibilities that we already have.

Amendments One through Ten
of the
Constitution of the United States of America
collectively known as
The Bill of Rights
ratified Dec. 15, 1791

Article I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble; and to petition the government for a redress of grievance.

Article II

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Article III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Article IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness, against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Article VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Article IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other rights retained by the people.

Article X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

Respecting the Flag

Flag Proportions

[From Executive Order No. 10834, issued by President Dwight D. Eisenhower August 24, 1959, effective July 4, 1960.]

Hoist (width) of flag	1.0
Fly (length) of flag	1.9
Hoist (width) of union	7/13
Fly (length) of union	0.76
Width of each stripe	1/13
Diameter of each star	0.0616

Respecting the Flag

THE FLAG CODE
Approved by Congress July 7, 1979

[The law of the United States of America governing use and treatment of the American Flag, known as the Flag Code, is contained in Title 36, Chapter 10 United States Code, paragraphs 170-178.]

170 - National Anthem; Star-Spangled Banner

The composition consisting of the words and music known as The Star-Spangled Banner is designated the national anthem of the United States of America.

171 - Conduct during playing

During rendition of the national anthem when the flag is displayed, all present except those in uniform should stand at attention facing the flag with the right hand over the heart. Men not in uniform should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should render the military salute at the first note of the anthem and retain this position until the last note. When the flag is not displayed, those present should face toward the music and act in the same manner they would if the flag were displayed there.

172 — Pledge of Allegiance to the flag; manner of delivery

The Pledge of Allegiance to the Flag, "I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.", should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove their headdress with the right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.

Respecting the Flag

173 – Display and use of the flag by civilians; codification of rules and customs; definition

The following codification of existing rules and customs pertaining to the display and use of the flag of the United States of America is established for the use of such civilians or civilian groups or organizations as may not be required to conform with regulations promulgated by one or more executive departments of the Government of the United States. The flag of the United States for the purpose of this chapter shall be defined according to sections 1 and 2 of Title 4 and Executive Order 10834 issued pursuant thereto.

174 – Time and occasions for display; hoisting and lowering

(a) It is the universal custom to display the flag only from sunrise to sunset on buildings and on stationary flagstaffs in the open. However, when a patriotic effect is desired, the flag may be displayed twenty-four hours a day if properly illuminated during the hours of darkness.

(b) The flag should be hoisted briskly and lowered ceremoniously.

(c) The flag should not be displayed on days when the weather is inclement, except when an all weather flag is displayed.

(d) The flag should be displayed on all days, expecially on New Year's Day, January 1; Inauguration Day, January 20; Lincoln's Birthday, February 12; Washington's Birthday, third Monday in February; Easter Sunday (variable); Mother's Day, second Sunday in May; Armed Forces Day, third Saturday in May; Memorial Day (half-staff until noon), the last Monday in May; Flag Day, June 14; Independence Day, July 4; Labor Day, first Monday in September; Constitution Day, September 17; Columbus Day, second Monday in October; Navy Day, October 27; Veterans Day, November 11; Thanksgiving Day, fourth

Thursday in November; Christmas Day, December 25; and such other days as may be proclaimed by the President of the United States; the birthdays of the States (date of admission); and on State holidays.

(e) The flag should be displayed daily on or near the main administration building of every public institution.

(f) The flag should be displayed in or near every polling place on election days.

(g) The flag should be displayed during school days in or near every schoolhouse.

175 — Position and manner of display

The flag, when carried in a procession with another flag or flags, should be either on the marching right; that is, the flag's own right, or, if there is a line of flags, in front of the center of that line.

(a) The flag should not be displayed on a float in a parade except from a staff, or as provided in subsection (i) of this section.

(b) The flag should not be draped over the hood, top, sides, or back of a vehicle or of a railroad train or a boat. When the flag is displayed on a motorcar, the staff shall be fixed firmly to the chassis or clamped to the right fender.

(c) No other flag or pennant should be placed above or, if on the same level, to the right of the flag of the United States of America, except during church services conducted by naval chaplains at sea, when the church pennant may be flown above the flag during church services for the personnel of the Navy. No person shall display the flag of the United Nations or any other national or international flag equal, above, or in a position of superior prominence of or honor to, or in place of, the flag of the United States at any place within the United States or any territory or possession thereof: provided, that nothing in this section shall make unlawful the continuance of the practice heretofore followed of displaying the flag of the United Nations in a position of superior prominence or honor, and other national flags in positions of equal prominence or honor, with that of the flag of the United States at the headquarters of the United Nations.

(d) The flag of the United States of America, when it is displayed with another flag against a wall from crossed staffs, should be on the right, the flag's own right, and its staff should be in front of the staff of the other flag.

(e) The flag of the United States of America should be at the center and at the highest point of the group when a number of flags of States or localities or pennants of societies are grouped and displayed from staffs.

(f) When flags of States, cities, or localities, or pennants of societies are flown on the same halyard with the flag of the United States, the latter should always be at the peak. When the flags are flown from adjacent staffs, the flag of the United States should be hoisted first and lowered last. No such flag or pennant may be placed above the flag of the United States or to the United States flag's right.

(g) When flags of two or more nations are displayed, they are to be flown from separate staffs of the same height. The flags should be of approximate equal size. International usage forbids the display of the flag of one nation above that of another nation in time of peace.

(h) When the flag of the United States is displayed from a staff projecting horizontally or at an angle from the window sill, balcony, of front of a building, the union of the flag should be placed at the peak of the staff unless the flag is at half staff. When the flag is suspended over a sidewalk from a rope extending from a house to a pole at the edge of the sidewalk, the flag should be hoisted out, union first, from the building.

(i) When displayed either horizontally or vertically against a wall, the union should be uppermost and to the flag's own right, that is, to the observer's left. When displayed in a window, the flag should be displayed in the same way, with the union or blue field to the left of the observer in the street.

Respecting the Flag

(j) When the flag is displayed over the middle of the street, it should be suspended vertically with the union to the north in an east and west street or to the east in a north and south street.

(k) When used on a speaker's platform, the flag, if displayed flat, should be displayed above and behind the speaker. When displayed from a staff in a church or public auditorium, the flag of the United States of America should hold the position of superior prominence, in advance of the audience, and in the position of honor at the clergyman's or speaker's right as he faces the audience. Any other flag so displayed should be placed on the left of the clergyman or speaker or to the right of the audience.

(l) The flag should form a distinctive feature of the ceremony of unveiling a statue or monument, but it should never be used as the covering for the statue or monument.

(m) The flag, when flown at half-mast, should be first hoisted to the peak for an instant and then lowered to the half-staff position. The flag should be raised to the peak before it is lowered for the day. On Memorial Day the flag should be displayed at half-staff until noon only, then raised to the top of the staff. By order of the President, the flag shall be flown at half-staff upon the death of principal figures of the United States Government and the Governor of of a State, territory, or possession, as a mark of respect to their memory. In the event of the death of other officials or foreign dignitaries, the flag is to be displayed at half-staff according to Presidential instructions or orders, or in accordance with recognized customs or practices not inconsistent with law. In the event of the death of a present or former official of the government of any State, territory, or possession of the United States, the Governor of that State, territory, or possession may proclaim that the National flag be flown at half-staff. The flag shall be flown at half-staff thirty days from the death of a President of a former President; ten days from the day of death of the Vice President, the Chief Justice or a retired Chief Justice of the United States, or the Speaker of the House of Representatives; from the day of death until interment of an Associate Justice of the Supreme Court, a Secretary of an executive or military department, a former Vice President, or the Governor of a State, territory, or possession; and on the day of death and the following day for a Member of Congress. As used in this subsection –

(1) the term "half-staff" means the position of the flag when it is one-half the distance between the top and bottom of the staff;

(2) the term "executive military department" means an agency listed under sections 101 and 102 of title 5; and

(3) the term "Member of Congress" means a Senator, a Representative, a Delegate, or the Resident Commissioner for Puerto Rico.

(n) When the flag is used to cover a casket, it should be so placed that the union is at the head and over the left shoulder. The flag should not be lowered into the grave or allowed to touch the ground.

(o) When the flag is suspended across a corridor or lobby in a building with only one entrance, it should be suspended vertically with the union of the flag to the observer's left upon entering. If the building has more than one main entrance, the flag should be suspended vertically near the center of the corridor or lobby with the union to the north, when entrances are to the east and west or to the east when entrances are to the north and south. If there are entrances in more than two directions, the union should be to the east.

176 – Respect for the flag

No disrespect should be shown to the flag of the United States of America; the flag should not be dipped to any person or thing. Regimental colors, State flags, and organization or institutional flags are to be dipped as a mark of honor.

(a) The flag should never be displayed with the union down, except as a signal of dire distress in instances of extreme danger to life or property.

(b) The flag should never touch anything beneath it, such as the ground, the floor, water, or merchandise.

(c) The flag should never be carried flat or horizontally, but always aloft and free.

(d) The flag should never be used as wearing apparel, bedding, or drapery. It should never be festooned, drawn back, nor up, in folds, but always allowed to fall free. Bunting of blue, white, and red, always arranged with the blue above, the white in the middle, and the red below, should be used for covering a speaker's desk, draping the front of the platform, and for decoration in general.

(e) The flag should never be fastened, displayed, used, or stored in such a manner as to permit it to be easily torn, soiled, or damaged in any way.

(f) The flag should never be used as a covering for a ceiling.

(g) The flag should never have placed upon it, nor on any part of it, nor attached to it any mark, insignia, letter, word, figure, design, picture, or drawing of any nature.

(h) The flag should never be used as a receptacle for receiving, holding, carrying, or delivering anything.

(i) The flag should never be used for advertising purposes in any manner whatsoever. It should not be embroidered on such articles as cushions or handkerchiefs and the like, printed or otherwise impressed on paper napkins or boxes or anything that is designed for temporary use and discard. Advertising signs should not be fastened to a staff or halyard from which the flag is flown.

(j) No part of the flag should ever be used as a costume or athletic uniform. However, a flag patch may be affixed to the uniform of military personnel, firemen, policemen, and members of patriotic organizations. The flag represents a living country and is itself considered a living thing. Therefore, the lapel flag pin being a replica, should be worn on the left lapel near the heart.

(k) The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning.

177 — Conduct during hoisting, lowering or passing of flag

During the ceremony of hoisting or lowering the flag or when the flag is passed in a parade or in review, all persons present except those in uniform should face the flag and stand at attention with the right hand over the heart. Those present in uniform should render the military salute. When not in uniform, men should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Aliens should stand at attention. The salute to the flag in a moving column should be rendered at the moment the flag passes.

178 — Modifications of rules and customs by President

Any rule or custom pertaining to the display of the flag of the United States of America, set forth in section 171-178 of this title, may be altered, modified, or repealed, or additional rules with respect thereto may be prescribed, by the Commander in Chief of the Armed Forces of the Unites States, whenever he deems it to be appropriate or desireable; and any such alteration or additional rule shall be set forth in a proclamation.

[Note: Federal law provides no penalty for violation of the Flag Code.]

Respecting the Flag

for more information contact:
Chapter #41, Vietnam Veterans of America
118 South St.
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Ms. Stout. In conclusion, Mr. Chairman and members of the committee, given the very high stakes of this issue of fundamental civil rights, Vietnam Veterans of America urges you to reject the constitutional amendment route. In this connection, there is an age old dilemma that faces legislators in a democratic society which poses the question of whether to support what the constituents apparently want or to support what is best for the preservation of our society.

We beseech you to resolve this dilemma on this issue by taking the high moral ground and demonstrating the political leadership that befits the furtherance of all well-established principles of free speech in our society.

Mr. Chairman, that concludes my statement, and I would be glad to take questions.

[The prepared statement of Ms. Stout follows:]

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STATEMENT OF

VIETNAM VETERANS OF AMERICA, INC.

Presented By

MARY R. STOUT,
National President

Accompanied By

PAUL S. EGAN,
Legislative Director

Before The

SENATE COMMITTEE ON THE JUDICIARY

On

Flag Desecration

September 13, 1989

Mr. Chairman and members of the Committee, the Vietnam Veterans of America, Inc. (VVA) appreciates this opportunity to present its views on the important and timely subject of flag desecration. At the outset, it must be said that we are unprepared to offer the kind of scholarly explication of this matter that you have already heard and will continue to hear from the legal profession and leading legal academics. Instead, we offer the prospective of a war-time veterans service organization that strongly fears that the best possible public policy decision in this matter might be obscured by the temptation to mollify public sentiments at the potential risk of fundamental rights of free speech that have become thoroughly woven into the American social and political fabric over the course of many, many years.

This is the first opportunity we have taken to publicly address this issue because neither our Constitution nor Resolutions contained clear guidance as to the will of our membership on either desecration of the American flag or first amendment rights. On August 3-6 of this year, however, our National Convention was convened and the delegates addressed this issue in clear and unambiguous terms. They overwhelmingly approved the resolution addended to this statement which supports a statutory criminalization of flag desecration.

On reviewing this resolution you should carefully note the sentiments expressed in the second and third WHEREAS clauses. Here it is recognized that the flag of our nation is, as it well should be, honored universally by Americans as a symbol of American pride in country, pride in our way of life. It is further recognized that flag desecration is so inimical to commonly practiced and understood sensibilities that such acts cannot be allowed to go unpunished.

The point in describing these two particular WHEREAS clauses is to emphasize what we believe best characterizes not only the sentiments of our own members in passing this resolution but also the sentiments of the general public on this issue. It seems clear enough that what our members and the general public want is punishment for unacceptable behavior that by now has been demonstrated to incite the basest of inclinations in normally reasonable people.

Several weeks ago, the same point was made by an individual in a letter to the editor of the Washington Post. In that letter criticizing the Supreme Court's decision in Texas Against Johnson, the writer asserted that protection of flag desecration under the guise of free political speech guaranteed by the Constitution missed the point and makes no more sense than similarly protecting the desecration of graves and cemeteries or the burning of crosses. Apart from this particular writer's criticism of the Court for deciding this matter based on the wrong principle, it seems clear enough that there are acts so egregious, so politically unacceptable and so dangerously inciteful that punishment must be imposed. Certainly flag desecration is one such act.

Our members agree, but they were thoughtful enough in their action to pass our resolution to distinguish their desire for punishment from the risky business of tinkering with Constitutionally guaranteed freedom of speech.

Mr. Chairman, we believe these are exactly the same sentiments expressed by the rank and file members of the other veterans service organizations whose leadership supports a Constitutional amendment, the same sentiments of those members of the general public who have expressed their opinion through the imperfect instrument of national public opinion polls on how best to remedy the flag desecration dilemma. We use the term imperfect with reference to the public opinion surveys because all that these devices can be expected to record is a snapshot of public opinion at a given point in time. They are incapable of discerning emotional responses from intellectual and incapable of drawing distinctions between responses that might have been different if other data were incorporated into the sample questions. There can be little doubt that the public has responded to this issue emotionally and it remains to be seen whether the public would be genuinely prepared to amend the Constitution if it considered the risks involved for basic rights of free speech.

If a member of the general public were surveyed on the question of providing public executions of rapists on Sunday afternoons during the half time of nationally televised professional football games, it is likely that the response would be affirmative if the respondent had just witnessed the rape of a spouse or family member. On the other hand, the response might be significantly different absent an immediate emotional experience. Similarly, the responses to national polls on the subject of amending the Constitution given the Supreme Court's decision on flag desecration -- a decidedly emotional matter -- cannot properly be used as a guide in formulating sound public policy.

Moreover, our members share the "fury factor" with other Americans on this subject, but they are unprepared to sacrifice free speech in the process of assuring that flag desecration is properly punished. Indeed, if our members preference on this issue can be generalized to reflect the sentiments of the general public at large, and we believe they can, the popular clamor for a Constitutional amendment to cure this problem constitutes medicine that is too strong and whose potential long-term side effects are contraindicated.

As an organization consisting of veterans who served during America's most recent and most unpopular conflict, we find it extraordinarily curious that the Congress completely ignored the widespread flag desecration that took place during the late 1960's and early 1970's. Can it be that this issue is only now, at a time of heightened political confrontation between the two political parties, being debated? As citizens, as taxpayers and most especially as patriotic Americans we have to seriously wonder what this debate at this particular point in time is really about.

Assuming for the moment that this Committee and the Congress will ultimately conclude that a statutory remedy is the most appropriate course of action, the question of what to do in the event that the Supreme Court overturns the statute remains. Our best guidance to the Committee on that question is to go back to the drawing boards and reconfigure the statutory remedy as many times as necessary until the Supreme Court relents.

In conclusion, Mr. Chairman, this is a serious issue, one not to be taken lightly and one deserving of careful consideration before rushing headlong toward a remedy that could very well curb in a substantial way our society's fundamental rights of free speech. Given the very high stakes in this issue of fundamental civil rights, the VVA urges you in the strongest possible terms to eschew the Constitutional amendment route. In this connection, there is an age old dilemma that faces legislators in a democratic society which poses the question of whether to support what the constituents apparently want or to support what is best for the preservation of our society. We beseech you to resolve the dilemma on this issue by taking the high moral ground and demonstrating the political leadership that best befits the furtherance of well established principles of free speech in our society.

Mr. Chairman, that concludes our statement.

FLAG DESECRATION
G-15-89

WHEREAS, on June 21, 1989 the Supreme Court of the United States rendered a decision in a case styled Texas Against Johnson holding that burning the American flag is protected by the First Amendment right to freedom of speech; and,

WHEREAS, the American flag is a symbol of American pride in country venerated universally by American citizens; and,

WHEREAS, the burning of the American flag constitutes a desecration so inimical to the common sensibilities that such acts cannot be allowed to go unpunished; and,

WHEREAS, statutory exceptions to the First Amendment have been allowed in cases involving defamation, distribution of obscene materials and protection of artistic and creative works under copyright laws; and,

WHEREAS, a legislative remedy capable of passing the Constitutional tests established by the Texas Against Johnson ruling can be fashioned to protect the American flag from desecration without resorting to a Constitutional amendment potentially damaging to fundamental rights of freedom of speech; therefore be it

RESOLVED that the Vietnam Veterans of America, Inc. at National Convention in Chicago, Illinois August 3-6, 1989 supports legislation to criminalize flag desecration; and be it further

RESOLVED that the language of such legislation meet the Constitutional tests set forth in Texas Against Johnson by approximating the following:

> "Whoever knowingly mutilates, defaces, burns, maintains on the floor or ground,or tramples upon the flag of the United States shall be fined not more than $1,000 or imprisoned for not more than one year, or both"; and be it finally

RESOLVED that the VVA calls on all Americans to honor the flag.

The CHAIRMAN. Thank you very much, and thank you all for what I must say of all the testimony that we have had, and we have had a lot of testimony on this, is concise and well stated and, I think, quite frankly, although you all claim not to be scholars, as well thought out as any that we received from any of the scholars on this issue; and I thank you for your straightforward and dispassionate analysis of this.

Seriously, it is hard. It is a hard thing. It is a very hard thing to be dispassionate about this. I mean, I was sitting on—as my colleagues will tell you, I have not done this probably a half a dozen times in my career to say what my, anything that my children said. I have a son who is a—I will not even identify which one of them—well, I better identify or they will both be mad at me. I have one who is a sophomore in college here at Georgetown.

In the summer, we were sitting on the beach with my father, my two brothers, and my son, and my brother-in-law, and another friend, and everybody had gone off the beach and the sun was going down, and we were just sitting there shooting the bull, and my sons were just, like, hanging around and being part of the discussion, and one of them said to me, "Dad, what are you going to do about this thing now, this thing about the flag," because I happened to have been given the responsibility as the chairperson, not that I am going to do anything, but how are we going to do this? And I said, "Well, you know, it's a tough dilemma." I said, "The first thing you want to do," and before I could say anything else, my son, who is a sophomore said, "Dad, you mean to tell me if a guy up the beach there," and he pointed as he said, "burned a flag," and Uncle Tom, a friend, is a Vietnam veteran, "and Uncle Tom saw that, that he doesn't have any right to go up and just pound that guy?"

And I said, "What do you think?" He said, "Well, I don't think you should be passing an amendment," but he said, "I think Uncle Tom should be able to go beat him up." [Laughter.]

And he said, "at a minimum," and he said, "I couldn't promise you I wouldn't do that."

So it is truly emotional, no matter what side of the issue anybody is on, and we all seem to be in agreement, at least all of the members here, and all of you there, that we want to prevent a situation, if we can legally do it and if there is a rational way to do it from the burning of the flag and the attendant things. So I thank you for not coming in and doing what could very easily have been done, not lending much at all to this dialogue, all of us telling our own little stories and, you know, and in a sense waving the flag in the wrong way. You are dispassionate; you are straightforward.

In that spirit, I would like to ask a couple dispassionate, straightforward questions for the purpose of finding out to make sure the committee understands fully where, when we begin this debate, assuming there is going to be a debate, a difference as to where everyone stands.

Some of the five of you, one having had to leave, feel strongly that a constitutional amendment is the preferable way. But as Commander Gierke indicated, his organization would say, there is no need for a constitutional amendment if there was a statute that was declared to be constitutional.

Now, my question is, if there was a statute, if there was, what they call, expedited procedures written into a statute, which is a way to get the case to the Supreme Court quickly and without having to burn a flag, and if the Court concluded that whatever the Congress had written was constitutional, would any of you, or your organizations, continue to persist in pushing a constitutional amendment? I believe that is a big "if." I acknowledge that is not the case yet. But if the statute were declared constitutional, would you still push for a constitutional amendment? Let me just go down the line.

Mr. Heilman.

Mr. HEILMAN. No, sir, we wouldn't.

As I indicated, the ball is in your court, and you have to do what is best; and that's the position that the DAV has taken. So if you crafted a statute, it withstood the challenge, and it effectively prohibited flag burning, and certainly applied sanctions to those who still did it, that would be fine with us.

The CHAIRMAN. Mr. Hogan.

Mr. HOGAN. Mr. Chairman, at our convention, as I had mentioned in my remarks, our delegates there, some 20,000, of course, voted unanimously to support a constitutional amendment. But I'm sure that if the proper legislation was drafted that we would be receptive to it; however, we do have some great reservations.

The CHAIRMAN. No, I understand. I am not trying to put any of you in the box of thinking that you think a statute can be drafted or if the one drafted would pass muster. I am just trying to get a sense of where we are in terms of the layers of this, to sort of peel the onion back a little bit.

Jack.

Mr. HOGAN. Mr. Chairman, if I just may for a minute, I want to thank you for that opening compliment that you gave me. I certainly thank you for it. But I am a Korean veteran, in the U.S. Army.

The CHAIRMAN. Is that right?

Mr. HOGAN. Yes.

The CHAIRMAN. Well, my staff will be fired. [Laughter.]

Because I read what they wrote, which is always a mistake sometimes and sometimes it is a mistake for them to read what I write, too, but I apologize, and we will correct the record. Thank you very much.

Jack.

Mr. POWELL. Senator, we have never believed in rabbit hunting with a cannon, so if a law will do it and not a constitutional amendment, that's fine. However, I would like to add this to it.

One thing that we would be greatly concerned about is the amount of time it would take the Supreme Court to rule on any legislative activity, and if the entire momentum stopped short of a constitutional amendment, so we kind of believe in going ahead with both. But if the legislation gets there first and it does the job, then, that's all we care about.

The CHAIRMAN. I understand.

Mary.

Ms. STOUT. Since we don't support a constitutional amendment—I said we don't support a constitutional amendment.

The **Chairman**. Yes. I wanted to just go down.

Now, Jack, I thought your extemporaneous comments were really significant, and they were extremely on point. One of the things that you mention, though, is one of the, I think, apparent contradictions in the way the statute and the amendment in question, not any amendment, because ultimately we have to vote not on just the idea, I, for one, think you can draft an amendment that does not impinge upon the first amendment. But I have grave doubts as to whether or not the one that is drafted does that.

Let me explain what I mean. You mentioned pornography, and you were making the case, you said, when folks ask the question what constitutes desecration and talk about by implication how difficult that is to define, you are reminded of the famous statement by a Supreme Court Justice saying, "I know what pornography is when I see it."

Now, for the last several years, and including in this administration, the last two Presidents have been trying to pass laws on pornography that expressly define it because they say that the way the law exists now, letting each State define it, and that is the essence of the law now, allows New York City to have pornographic public showings that in Seaford, DE, would be viewed as pornographic, but are not viewed as pornographic in New York, and, therefore, they say, pornography is pornography is pornography, and we should define it for the Nation.

Yet, ironically, they come in with a constitutional amendment, not on pornography, but on the flag, that says the opposite. It says, let the people in New York City decide what they think desecration is, but let the people in Seaford be able to decide what desecration is; and if they are different, so be it. In effect, it seems to me they are saying local community standard should apply to defining what constitutes desecrating that emblem; and we do not want local community standards to apply to define what constitutes pornography.

The point that I am trying to deal with, grapple with myself here is, would it be better if the constitutional amendment, assuming we pass one, was one that defined, for all of America, precisely what we meant by "desecration," as opposed to letting one State have one definition, another State have a different definition? For example, let's assume in some States, because there is strong sentiment, that the flag could not be used for "fashion," that you can't go into Bloomingdales or into the famous shops, which are ten steps above that in terms of cost, and buy these multi thousand dollar sequinned gowns that women have with the flag across the top of it, which, by the way, are made now.

Now, I could very well picture my State, a more conservative, traditional State saying, you can't do that; you can't use the flag on clothing. A woman in Philadelphia having gone to New York, bought one of those and be invited to a formal undertaking in Delaware and has to wonder, whether she crossed the State line, whether or not she's not violating the law in Pennsylvania, but she is violating the law in Delaware.

Now, I—and this is my question—I have not heard anybody say, anyone offer an explanation that is different than this, that is, that if the President's constitutional amendment passed, there would be no uniform standard in America; there would be none. No one has contested that.

As a matter of fact, it's argued that's one of the virtues of the amendment.

My question is this, is uniformity relating to the flag desirable in America because it is the national symbol, or is it our intention and desire to have the national symbol be able to be treated 50 different ways with varying degrees of reverence? Which is preferable, uniformity or varying degrees of reverence? And I will just go down the line.

Mr. HEILMAN. I don't know if I am going to be able to—I don't think I can answer your question, Senator. It is very difficult. I think Jack really touched on it when he said, with respect to pornography, beauty is in the eye of the beholder. I guess desecration could very well be in the eye of the beholder, also. I think——

The CHAIRMAN. But isn't that what we are trying to avoid? Aren't we trying to avoid allowing the eye of the beholder to determine what could be done with that flag?

My objective in writing a statute is to say that the flag is the unifying symbol of America, and there are certain absolute rules, no matter how your eye views it, certain absolute rules that can't be violated with regard to that flag, and that's my intention; simple, stark, certain things cannot be done, regardless of the reason, whether you are doing it because you are a war hero or your a seditionist, it doesn't matter, certain things can't be done, one of which is, you can't burn it, boom; the other is, you can't lay it on the ground and put it in your door and have people walk on it.

I may be wrong, but I want to tell you what my objective is. If it is the unifying symbol, don't we require a unified standard by which to measure whether or not it is being violated, desecrated, destroyed in some way? That's what I'm at a loss at.

Mr. HEILMAN. I don't know if you can make a—you could make a laundry list, and probably spend the rest of your life adding one more, and someone would be able to come up with something that's not covered there that people would say, yeah, that's offensive, too, and that should be added. I don't know if that is possible.

The CHAIRMAN. That's right. That's always a difficulty of legislation, because you put your finger on it. I mean, it drives me nuts when I see the American Nazi Party marching, first of all, it drives me nuts when they march down the street, and I must tell you my intellect tells me one thing, they have to have the right to do that, but my instinct gives me another. It drives me nuts when I see the Ku Klux Klan come out, those vicious bigots in their silk garb with an American flag right on the sleeve and stand there with a burning cross and the American flag, I find it literally, no fooling, I find it disgusting.

Now, my problem is that when I start to respond to my gut and say, OK, from State to State we can let everybody decide what they want to think about it, I'm afraid that people are going to be as emotional as I am and not resist their instinct, and I can very well picture my State saying, Ku Klux Klan can't fool around with the flag. But I can picture another State saying, it's OK for the Ku Klux Klan to wear the flag.

I find it almost as—I find it as offensive that the Ku Klux Klan puts a flag on their silk pajamas as I do that idiot in Texas burning the flag. I don't see one as more desecrating than the other. One goes against every value we hold. So my problem is, and I guess the end of it is, I need some help figuring out how the statute can work. If it's to symbolize unity, how can we not say we need a unifying standard? That's my problem. My time is up, only about a second, why don't you respond to what I was going to resist, my emotional outburst here, and you all tell me——

Mr. HOGAN. Mr. Chairman, I would just like to respond with my good colleague here that it's utopia to really try to think that we could cover all the gambit of what's involved with our beloved flag. It would be extremely difficult. That's why we would have to give it a great deal of thought, as you have apparently done.

The CHAIRMAN. I appreciate your comment.

Jack.

Mr. POWELL. Mr. Chairman, you've probably made one of the greatest arguments for doing it legislatively, because I would live, and I think we all would be in horror of the idea of constitutionally, I mean, nobody would want to be able to carry the book around that contained the Constitution with all the pages of amendment trying to consider every possible situation in which a flag could be used or not used. But there is a great thing about this Nation. Laws can be passed and, then, laws can be interpreted.

Now, for a pilot, as an example, who on their flight suits wore the American flag on their sleeve, certainly I don't think anyone would call that desecration. But if that pilot took off that flight suit and wadded it up and threw it in a urinal, besides having a fight with everybody in the bathroom, we probably could come to a pretty clear decision that that's desecration. So, there is a large part to do with intent. A woman who wears a dress with the American flag on the top half of it, it depends on where the stars are at, I don't know.

These are things that I don't think we necessarily need to answer with every "i" dotted and every "t" crossed in order to go ahead with the legislation that's here and to work on the process of a constitutional amendment, and if the legislation solves the purpose, fine. But the question of defining desecration is as important in the legislation as it is in the constitutional amendment.

The CHAIRMAN. That's why in the legislation I do define it. I don't use the word desecration, I define it, and I may not have as exhaustive a list as people want, but it is defined.

Ms. STOUT. I think there's two things going on I have to disagree with. I think your argument is almost stronger for, let's not do anything because there are so many things we could do. But I think when you are talking about legislation, the simpler it is, the clearer it is, the more understandable it is, then, people can say, that's what it says.

Jack talked about the dress. I was talking to one of our members in New Jersey and said, you know, when will it land? Will my husband not be able to wear his stars and bars running shorts that he is very proud of when he runs in the Marine Corps marathon? Will that be something that he won't be able to do? And I said, will women not be able to wear bathing suits, you know, on the beach that had the stars on the top and the stripes on the bottom, and he said, it depends on what her figure is. [Laughter.]

And those are the kinds of things people are talking about. So, I think the clearer it is, the simpler it is, that's what it needs; and I think having every State make the decision. Unfortunately, what we get into, and what some people have even talked about this whole issue being in the way that it's been brought up, is politics.

The CHAIRMAN. My time is up. With the indulgence of the committee, let me just make one last comment, not a question.

The reason why it has to be defined, in my view, is to not define it means that, by definition, we are going to outlaw certain actions based on their intent and their speech, by definition, we will be amending the first amendment, because we will be saying for the first time in our history you can outlaw an action if the action contains an idea you don't like. You can outlaw wearing the bathing suit if, in fact, a socialist is wearing it because we reject socialist ideas. You can't outlaw wearing a bathing suit if it is a capitalist that is wearing it.

When we get into intent, Jack, by definition, we are amending the first amendment. If the purpose of the statute is to go at the intent, then, we are saying we are specifically allowing States to outlaw certain ideas and to make legal other ideas, for you could say, ridiculous as it sounds, by definition, we don't like Republicans being able to wave the flag at their convention, because we don't like their ideas, if you're in the majority, and so they can't have the flag; bizarre, it won't happen, but to extend the point; and that's my worry.

That's why I think a content neutral statute or amendment is the only way not to amend what we have avoided doing for over 200 years, the first amendment.

Anyway, I yield, and I will not come back on that issue.

Senator THURMOND. Thank you, Mr. Chairman.

I want to congratulate the Legion, the DAV, the VFW, the Paralyzed Veterans, the Vietnam Veterans for being represented here today, and I, also, want to congratulate you for your purpose of feeling that action must be taken to offset this Supreme Court decision, the *Johnson* case of Texas. I believe you all are in accord on that; is that correct, Ms. Stout, you, the rest of you, all of you?

Ms. STOUT. Yes.

Senator THURMOND. Now, the only question is whether it will be a statute or a constitutional amendment.

I have no objection to a statute. I will support a statute. It may work; it may not work. But why risk it? If you have a statute, it may appealed to the Supreme Court, it may be several years before it's finally decided.

In my opinion, if we pass a constitutional amendment this session, the legislatures of the States would act promptly and the matter would be settled.

Now, as to the wording, this constitutional amendment, the one I first introduced, contained more detail, such as, burning, mutilating, defacing, defiling, trampling, and so forth, while this committee considers the matter by the White House and the Representatives of Congress decided to make it very simple, and just provide physical desecration. That doesn't involve freedom of speech, physical desecration. Those things that my amendment first contained are physical desecration, and if this constitutional amendment passes, then the Congress can pass a statute that will lay out just what desecration is, and that would apply nationwide, so far as the Federal law is concerned.

Now, the States could pass similar laws. I imagine they will, more or less, follow the Federal law. Another reason the constitutional amendment is more desirable than a statute is because you cannot be sure that the Supreme Court hearing the case, whether it's today or in 1 year or 2 or 3 years from now, would uphold a statute. I'm not too sure they would uphold it. Then it may be years later, if you just depend on a statute alone, it may be five or ten years before you finally get action.

The next thing, even if they did uphold it, the Supreme Court has a way of reversing itself. In 1896, they upheld a separate but equal facilities. In 1954, they reversed that. In 1972, they passed a decision on abortions. This year, they have reversed that decision, in part. So how do you know what the Supreme Court is going to do in the years to come? The only safe way to guarantee protection here, in my judgment, is a constitutional amendment.

I vote for a statute. It might prove effective, until somebody challenges it, and, then, you don't know what will happen. If you pass a constitutional amendment, you know exactly what you're doing, you get results, and no court can undo that; and so, therefore, I favor the constitutional amendment if I had to choose between the two. We certainly ought to pass a constitutional amendment. If you want to pass a statute, it's all right, I have no objection. I'll even vote for it. So that explains my position. I just wanted to pass that on to you.

We are delighted to have all of you here. We commend you for your interest in this matter, and I assure you that we must take some action, and I will certainly be one that will insist on action being taken at this session of this Congress. Thank you very much for your presence.

The CHAIRMAN. Senator Specter.

Senator SPECTER. Thank you very much, Mr. Chairman.

I had been at the hearings at the outset. I had to depart to participate on the appropriation process on the subcommittee where I'm ranking, and I want to compliment you, again. It is past noon time and you were sitting all morning yesterday. What starts as a rather full hearing eventuates into the chairman being here with a relatively limited amount of company.

Senator Biden and I had a hearing in Philadelphia on this subject, and there have been a series of hearings. Since then I thank the witnesses for coming forward, and wanted to express my own views very briefly this morning.

I agreed with the opening comments that I was here for when Senator Dole and Senator Dixon commented about the disappointment with the Supreme Court ruling because of the latitude for upholding the statute, well within the context of precedence on fighting words or incendiary language or obscenities. We are now in a situation where the issue is, what should we do?

We heard very expansive testimony in the Philadelphia hearing about doing nothing, and I can understand the proponents of that position. We've had the request for a constitutional amendment, and I can understand the proponents there. But my own view, after working through the opinions very carefully is that we ought to take the statutory approach, which I think can be articulated in a way to pass constitutional muster.

There are instances, without detailing them now, where the Supreme Court of the United States has been very responsive to the public mood at a number of points in our national history, and Justice Scalia has talked about a national consensus. I wanted to make this observation, and I wanted to ask Senator Dole this question, but I could not stay. I know Senator Dole's background very well because he and I attended the same American Legion post. We hail from the same small town in Kansas, Russell, KS, and I know the sensitivity of the circumstances where Senator Dole has formulated his own views.

My finding has been that the great intensity which followed the decision has abated somewhat, and there's a more reflective mood in America. In my open house town meetings immediately following the decision, there was just outrage about the decision, and a very strong sense for a constitutional amendment.

I think there's been a second thought, and my sense is, with the concerns about the impact on the Constitution, that there has been a mellowing, so to speak. A demand for action still exists, but it is an action which I think can be accommodated within the context of a statutory change. It really depends upon intensity as to whether you can have a statute with 51-percent majority or whether you can have a constitutional amendment with two-thirds, then, ratification by three-fourths.

I did want to return to the hearings to express myself to that extent. We are in a very onerous markup season on appropriations, and I regret not being here for the entire hearing and not being able to stay longer.

Now, in the absence of the chairman, I yield to my distinguished colleague from Iowa.

Senator GRASSLEY. Thank you.

The chairman said that he'll be right back, so I will go ahead in his absence. I hope he's able to listen to something I have to say. It's not contrary to anything he said in the sense of all the questions he raises about what the amendment might do or not do, or what is a flag and what isn't a flag, or what's desecration of the flag and what isn't desecration of the flag.

But in the final analysis, that's not the issue before us. We are not changing public policy of the last 200 years dramatically, or at all, through our amendment.

The amendments that we have before us do nothing more or nothing less than undo the *Johnson* case. So, whatever that public policy was before the five-to-four Supreme Court decision, Senate Joint Resolution 180 allows that environment to exist.

I want to start with Ms. Stout. Clarify for me that your organization is opposed to both a constitutional amendment and a statute?

Ms. STOUT. No. No, Senator Grassley.

Senator GRASSLEY. You are supporting Senate bill 1338?

Ms. STOUT. We are supporting statutory criminalization of flag desecration, yes.

Senator GRASSLEY. By statute?

Ms. STOUT. By statute, yes.

Senator GRASSLEY. And you believe that can be done by statute?

Ms. STOUT. Yes, sir. That is the understanding of members of our organization.

Senator GRASSLEY. If you had any doubt that it could be done by statute, do you feel strongly enough about overturning the *Johnson* case that you would support a constitutional amendment?

Ms. STOUT. Senator Grassley, I really can't answer that on behalf of the Vietnam Veterans of America.

Senator GRASSLEY. Could you answer it for me as an individual?

Ms. STOUT. Personally?

Senator GRASSLEY. Yes. From you personal point of view?

Ms. STOUT. It becomes a question of my feeling about the in roads on free speech.

Senator GRASSLEY. Yes.

Ms. STOUT. And personally, I think that I would go for free speech. But I——

Senator GRASSLEY. Did you have any problem before the *Johnson* case with the status of flag desecration statutes? Do you have a problem now because the Supreme Court has spoken?

Ms. STOUT. I have to answer personally.

Senator GRASSLEY. Yes.

Ms. STOUT. Because the—I served in Vietnam, and I went through a period of time when people in the sixties and seventies very freely burned the flag; and how many of those people were prosecuted for whatever, I don't know.

There wasn't a large outcry, as I recall, from the Congress, nor from the American public, to have a constitutional amendment. As a matter of fact, someone was just telling me yesterday about their basic training—I went through officers basics, so I didn't go quite through the same thing—about seeing a film of demonstrators burning an American flag and saying, doesn't that make you mad, doesn't that make you mad; and all the recruits saying, yes, it does. What do you want to do about that? We want to go kill him.

That's what you're fighting for in Vietnam. You're fighting for the rights of Americans to make that kind of political statement.

Senator GRASSLEY. That's what the basic training film said?

Ms. STOUT. No; this was a film—no. This wasn't a film. This is what their DI said to them. That's what you were fighting for, and maybe that's a way of getting people up to, say—but, you know, the question I guess for me personally is, what's the most basic thing and what's most important?

Very recently, I spent some time in Southeast Asia and I walked around with a little American flag lapel pin, and I had a lot of Vietnamese coming to me. If I had 1,000, I could have given them all away. I realized being in that country where people wanted to talk to me, but it was, you know, come in here and we'll shut the door, that perhaps the most important right we have, and the one that people lose when they lose freedom, or isn't there in the Communist countries, is their right to free speech; and it is so important that I guess I would allow for that symbol of all those things that are American to be destroyed, rather than lose those rights because you can burn every flag there is in the United States and we will still have those rights, and we will still be America. I wouldn't do it, and you wouldn't do it; and maybe no one will ever test the constitutional amendment or the statutory criminalization, maybe no one every would; and that's what we want to do. That's what the American public wants to do is stop people from desecrating our flag.

Senator GRASSLEY. Let me ask the question that Commander Gierke of the American Legion asks rhetorically in his testimony. "Why, despite all the talk about it being a victory for the Constitution and the protection of free speech, do we feel no joy over the Supreme Court's *Johnson* decision?"

Do you feel joy over the Supreme Court's decision?

Ms. STOUT. No; no, I don't.

Senator GRASSLEY. Well, then, why, if we don't feel any joy over this and if we overwhelmingly feel the Supreme Court didn't rule the right way, is there a reluctance to move forward when we aren't doing anymore than just returning to the pre-*Johnson* environment?

Ms. STOUT. Mr. Grassley, I think that, you know, and I mentioned the Vietnam era. A lot of things changed in this country during that period of time, a lot of feelings about our Government, but I don't think a lot of feelings about our freedoms because I think that those freedoms were ever more brought home to us, what we have, for those of us who served in Vietnam, for those of us who saw the fall of that country that we thought we were fighting to give them the freedoms that flag stands for. I think there is a different mood in the country. I think there is a change about what's most important. I think I learned that having served in the military about what's most important, and I would protect the flag. But I wouldn't protect the flag over protecting someone's life. That's more important to me than the American flag.

I wouldn't protect the flag over protecting my children or protecting you. The flag is only a symbol of what we are and who we are and those freedoms, and I come to that thing. I love the flag. My husband hung it up this morning, which, it's not always up at our house, because I was coming to testify before this committee. But I love most what it stands for, and the freedoms that it stands for.

I'm caught in that dilemma that all of us are caught in. How do we ensure that we protect that freedom?

Senator GRASSLEY. Well, if burning the American flag, in your judgment, promotes free speech, then, it seems to me that you would find joy in the Supreme Court's decision if your ultimate goal is the expansion of free speech, including the license to burn the flag.

Ms. STOUT. No; my goal is not the expansion of free speech. We have free speech.

Senator GRASSLEY. But isn't that the result of the *Johnson* decision?

Ms. STOUT. It's the preservation. This is—and I have to make it very clear to you Mr. Grassley, this is my personal opinion you are asking about. Our organization has not debated this. Our organization has not discussed this issue.

Senator GRASSLEY. The Supreme Court has expanded the first amendment through this decision.

Let me ask any of you——

The CHAIRMAN. Excuse me for a second. I just want to make sure I understand it.

Your position is——

Ms. STOUT. We support statutorily.

The CHAIRMAN [continuing]. Statutorily if you can overturn that decision.

You're not here saying that you would not like to see the decision statutorily overturned as long as it didn't interfere with free speech?

Ms. STOUT. That's correct.

The CHAIRMAN. But you are saying, as I understand it, your organization as well, that a constitutional amendment is not necessary, and some I guess are saying that, and you're saying, because it might impinge upon free speech to go that broad with an amendment; is that correct?

Ms. STOUT. Yes.

The CHAIRMAN. OK.

Ms. STOUT. Mr. Biden, and as I said to Mr. Grassley when you weren't here, all of the ramifications because of the period of time, the short period of time between the court's decision and our national convention, all of the ramifications were not discussed in detail as we are doing it here. If, in fact, the statutory criminalization fails the constitutional test, I guess I'm very happy that we have a period of time that it would take for a constitutional amendment, for the members of our organization to discuss that, and what would be the ramifications.

As I stated in my statement, a letter from one of our chapters said that they would preserve the right to free speech at the cost of a few flags, and that's really what this discussion is.

The CHAIRMAN. And just for the record, there was no statute that existed in this country protecting the flag prior to 1968. So if we're talking about pre-*Johnson* era, are we talking about the first 200 years or the last 20 years?

But at any rate, I yield. I'm sorry. I yield back to my colleague. He has the floor.

Senator GRASSLEY. Well, with all due respect, Mr. Chairman, and also to Ms. Stout, I'm not so sure that because of what she has said in response to my questions, that there isn't some ambiguity between the position in support of the statute, as opposed to how the Supreme Court decision is viewed.

Ms. STOUT. Mr. Grassley, could I say again that you asked me my personal opinion. You asked me my personal opinion. I have come here today to represent the members of our organization who made a very clear statement about this issue.

Senator GRASSLEY. I understand.

Ms. STOUT. It's a very difficult issue for all of us. It's a very difficult issue for me, and I want to be really clear for the members of DVA that you don't walk away saying, that's what they all say. We haven't talked about that difference, and I wanted to be really clear about that. I understand your position and how difficult this is, because we're dealing with it ourselves.

Senator **Grassley**. And I want you to know that I understand the difference between your view and the view of the organization. I want you to know that I asked for your view, and I respect your view. I wanted to get to the bottom of it, and I think we have done very well.

Let met ask a question that my constituents have asked me.

The people asking me this question obviously view burning the flag as an act of disrespect. Do all acts of disrespect, undisciplined behavior, and violence have to be excused, accepted, or tolerated as rights of personal freedom; in other words, is there no longer any difference between liberty or license?

Mr. **Heilman**. No, sir. I think, as has been demonstrated this morning, and I'm sure in your previous hearings, there are prohibitions, inhibitions of people's right in this country to speak, behave, and act in certain fashions. No one has total freedom. I think that's evident.

In terms of this debate, we do not believe in the DAV that imposing criminal sanctions for flag burning is inimical to freedom of speech. We look at desecration of the flag, certainly the type that Mr. Johnson engaged in, the purpose behind that was to incite a violent public reaction. As I said earlier in my testimony, he did say things that day, and he has the right, to this day, to say the same things. We don't believe that type of behavior and action, you know, will preclude a person's ability to dissent.

Mr. **Grassley**. Thank you, Mr. Chairman.

[The prepared statement of Senator Grassley follows:]

STATEMENT OF SENATOR CHARLES E. GRASSLEY
SEPTEMBER 13, 1989

MR. CHAIRMAN, THIS THIRD OF FOUR SCHEDULED HEARINGS IS TO HEAR THE VIEWS OF TWO OF OUR DISTINGUISHED COLLEAGUES -- SENATORS DOLE AND DIXON -- AND REPRESENTATIVES OF VETERANS GROUPS.

WE ARE HERE TODAY BECAUSE THE VAST MAJORITY OF AMERICANS FEEL THE SUPREME COURT WAS WRONG IN THE JOHNSON CASE.

AS IF THERE WAS ANY DOUBT, A GALLUP POLL RELEASED MONDAY SHOWED - BY A 2-TO-1 MARGIN - THAT AMERICANS WANT A CONSTITUTIONAL AMENDMENT TO RIGHT THIS WRONG. IN MY VIEW, THE CONSTITUTIONAL AMENDMENTS WE HAVE BEFORE US WILL NOT CHANGE THE CONSTITUTION -- AS MANY CRITICS HAVE CHARGED -- RATHER THEY WILL RETURN US TO THE STATUS QUO, BEFORE THE COURT'S DECISION.

WE ALL KNOW THAT THE FIRST AMENDMENT WAS ADDED TO THE CONSTITUTION TO INSURE THAT INDIVIDUALS WOULD BE FREE TO ENGAGE IN ROBUST, OPEN, AND PUBLIC DEBATE, AND WITHOUT INTERFERENCE OR THREAT FROM SOME GOVERNMENTAL SANCTION.

CONSEQUENTLY, THE FIRST AMENDMENT PROTECTS SPEECH THAT CHALLENGES THE VERY FOUNDATIONS OF THE REPUBLIC. IT PROTECTS SPEECH THAT IS EVEN OUTRAGEOUS TO THE VAST MAJORITY OF THE AMERICAN PEOPLE.

EVEN SPEECH THAT REFLECTS THE VIEWS OF ONE INDIVIDUAL IS PROTECTED.

THIS IS THE WAY IT SHOULD BE.

MAKE NO MISTAKE ABOUT IT: THERE SHOULD BE NO RESTRICTIONS ON THE LEGITIMATE FREE SPEECH RIGHTS OF AMERICANS.

HOWEVER, THE DRAFTERS OF THE FIRST AMENDMENT DID NOT MEAN TO PROTECT SPEECH TO THE EXTENT THAT "ANYTHING GOES". THE FIRST AMENDMENT HAS NEVER BEEN REGARDED AS "ABSOLUTE". IT DOES NOT ALLOW FOR THE PUBLICATION -- IN WHATEVER FORM -- OF EVERY KIND OF SPEECH, UTTERANCE, EXPRESSION, OR ACTIVITY.

I BELIEVE THAT ALTHOUGH THE FLAG IS INDEED AN OBJECT, IT IS NOT JUST ANOTHER PIECE OF CLOTH OR FABRIC -- TO SO THINK IS TO TRIVIALIZE IT.

THE FLAG IS THE UNIQUE SYMBOL AND MANIFESTATION OF OUR NATIONHOOD. AND EVEN THOUGH IT IS NOT A SACRED ICON OR OTHER ITEM THAT HAS TAKEN ON A RELIGIOUS QUALITY, IT DOES, IN MY VIEW, DESERVE TO BE PROTECTED.

AS SUCH, IN MY OPINION, THOSE WHO BURN A FLAG ARE ENGAGING IN "EXPRESSION" OR "CONDUCT" THAT TAKES ON CHARACTERISTICS QUITE DIFFERENT THAN SPEECH.

I BELIEVE THAT WE ARE OBLIGED TO RESPOND TO THE SUPREME COURT AND RE-ESTABLISH THE STATUS QUO PRIOR TO ITS DECISION IN TEXAS v. JOHNSON.

I LOOK FORWARD TO THE TESTIMONY WE WILL BE HEARING TODAY.

THANK YOU.

The **Chairman**. Thank you very much. You've been a very forthright panel and a very helpful panel. As you can see, and you've helped us outline it, we have some hard decisions to make, for example, we have the hard decision to make whether or not Senator Grassley is correct, or whether I'm correct; does the constitutional amendment just restore the law to what it was before?

Most of the experts we've had before us say, no, it goes beyond what the law was before. No State in the Union thought before they could outlaw in their statutes the wearing of a flag on the lapel of a uniform, depending on whose it was. All the States have exercised restraint in how they attempted to define theirs.

Under this, by constitutional amendment, by definition, there is no restraint; there is none, by definition, except good judgment; no legal restraint. So, that's a debate we've got to decide. Senator Grassley may be wrong and I may be right, and I may be wrong; he may be right. There's a lot of things, and you've been very helpful.

Senator **Grassley**. Mr. Chairman, just one more point.

The **Chairman**. Yes.

Senator **Grassley**. You said that there was no statute that existed in this country protecting the flag prior to 1968. But the Texas statute was 100 years old.

The **Chairman**. No; I meant there is no Federal law.

Senator **Grassley**. Yes. But when I speak about the pre-*Johnson* environment, I refer to any State law that prohibited desecration of the flag, and which presumably did not violate freedom of speech, and which presumably, until the *Johnson* decision, was constitutional.

The **Chairman**. One of the debates we're going to have here is whether or not *Johnson*—what *Johnson* meant. Did *Johnson* mean that there can be no statute that outlaws the burning of the flag, or did it say that only those statutes which require there to be an ingredient that the person intended to cast contempt and to offend others?

That's what the Texas statute said. They go through it, as you said. The Texas statute didn't say, expressly say—if you just burn the flag, that's not enough to be found guilty under the Texas statute. You have to have, to be found guilty under the Texas statute, have the intention of not only casting contempt, but to offend others, and that was one of the defenses that was argued. No one was offended.

If they could prove no one was offended by the burning, then there's no gravamen for the case under Texas law, and the Texas attorney general acknowledged that, and the court acknowledged that.

So, let's make clear what the statute said, I mean, what the decision said. The decision did not say that Gregory Johnson would have been found guilty had he silently walked up and burned the flag with no one else around, nobody else around. That would not have even made him guilty under Texas law. Under Texas law, as your staff will tell you, Commander Hogan, and others, he had to have had someone there, someone had to see it, and someone had to be offended by it. So even under Texas law, it wasn't sufficient just to burn a flag.

Anyway, as you can see, it gets pretty complicated, and we're going to do something. We are going to protect the flag somewhere along the line. The question is the best way to do it.

I thank you all for being here. You have helped us focus more, and I think the more light that gets shed on this, the more likely we are to make the right decision. Thank you very very much.

Senator THURMOND. We want to thank all of you for your appearance. We appreciate your coming.

The CHAIRMAN. Our next panel, the first member is Gary Freeman. Mr. Freeman was a Navy seabee in Vietnam between 1965 and 1967. He is a native of Hutchinson, KS, and he currently resides there, and I want to personally thank you, Gary, for taking the time to make this trip here. It is a long trip to Washington, and I know you have other things that you are required to be doing at home and your time, but obviously it is representative of how intensely you feel about this that you would take the time to come and testify, and we appreciate it.

The second member of the panel is Col. Harry Summers. Colonel Summers is a combat infantry veteran of both the Vietnam and Korean Wars, where he was twice decorated for valor and combat. Is he here? He, apparently, is on his way in, so I will continue the introduction.

Currently, Colonel Summers is editor of Vietnam Magazine, and is a syndicated columnist for the Los Angeles Times.

Senator THURMOND. Where is he?

The CHAIRMAN. He's coming in. Apparently, he was in the hallway.

The final member of the panel is James Warner, a flight officer who served in the U.S. Marine Corps in Vietnam. Mr. Warner was shot down in Vietnam and was held as a prisoner of war for 5½ years. He received several medals for valor in action, and he is currently an attorney here in Washington, DC. Gentlemen, we will not wait for the Colonel's arrival. We will begin.

I would like to begin with you, Mr. Freeman, and again, thank you for taking the time to come.

STATEMENTS OF GARY FREEMAN, HUTCHINSON, KS; COL. HARRY G. SUMMERS, BOWIE, MD; AND JAMES H. WARNER, WASHINGTON, DC

STATEMENT OF GARY FREEMAN

Mr. FREEMAN. Distinguished members of the Judiciary Committee, I want to thank you for giving me the opportunity to testify today.

My name is Gary Freeman, and I live in Hutchinson, KS. As you know, I am not——

Senator THURMOND. Mr. Freeman, speak out so we can hear you. We cannot hardly hear you.

Mr. FREEMAN. OK. My name is Gary Freeman, and I live in Hutchinson, KS. As you know, I am not a constitutional scholar. I am not a legal expert. I am a husband and father, and someone who works hard every day to earn a living as a treatment plant operator in South Hutchinson. I am also a man who loves his country, a man who spent 2 years fighting for America in Vietnam, and an American who feels very deeply about our Nation's flag and about the principles that the flag has come to represent.

You know, while I was in Vietnam, I saw a lot of people who were not free, who did not enjoy the simple freedoms we take for granted here in the United States. I saw a government that oppressed the people, not a government of the people, for the people, and by the people.

The Vietnamese did not know what true freedom meant then, and they still do not know what freedom means now. But, as an American, I was weaned on freedom. I tasted freedom every day of my life.

When I was in Vietnam, I saw children who drank, bathed, and washed their water buffaloes all in the same river. I saw mothers who washed their children's clothes and used the same water for cooking. I saw people in Da Nang defecate on the streets as if it was no big deal, an everyday occurrence.

So, my experience in Vietnam reaffirmed what I already knew, that we in America are indeed blessed, blessed with many material possessions, and blessed with a Constitution that safeguards our precious freedoms.

That is why I, and so many other veterans, were outraged when the Supreme Court said that our flag can be burned, that it can be desecrated by anyone at any time, that it can be thrown away like some old washrag.

With all due respect to the Court, I think I and millions of other Americans know better. I know that the flag has followed every American regiment, every American battalion, and every American platoon into battle. I know that the flag rests respectfully on the caskets of our dead soldiers. And I know that the flag is given to the spouses of our deceased veterans, many of whose names appear on the Vietnam Veterans Memorial right here in Washington. The names of some of my friends appear on that memorial.

The flag, in other words, is far more than just a piece of cloth. The flag is the very symbol of our freedoms, our values, our aspirations as a Nation. And it deserves constitutional protection.

They say the colors of the flag do not run. But I know that the colors of the flag flow through the veins of every American fighting man and women until their dying day.

So, in my opinion, allowing people to desecrate the flag is a slap in the face to every man and woman who has ever fought for their country. To let the flag and the principles for which it stands be desecrated at will is like someone assaulting your wife or your daughter, and walking free to do it again. I know this is a pretty strong statement, but this is what I believe in my heart.

Because of my outrage, I joined with other members of the American Legion in an effort to collect petition signatures, urging Congress to pass a constitutional amendment to project the flag. My wife Rita and I collected more than 2,500 signatures in downtown Hutchinson. Obviously, that is a whole lot of angry people demanding that Congress take swift action on an amendment.

Mr. Chairman, I want to conclude my remarks by just saying this. We had better relearn the meaning of the motto, "God and Country," before it is too late, or we will all be in trouble. We all know that our children will have a far greater burden than any burden that members of my generation had to carry.

After all, our children are the leaders of tomorrow. They need good examples set before them. They need our Nation's leaders to stand up for the flag and for the cherished principles that the flag represents.

Mr. Chairman and other distinguished Senators, the legacy of our Nation, a legacy that our children will inherit, is in your hands.

Thank you for your kind attention.

[The statement of Mr. Freeman follows:]

STATEMENT OF GARY FREEMAN BEFORE THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE

CONSTITUTIONAL AMENDMENT TO PROHIBIT FLAG DESECRATION

Mr. Chairman, distinguished members of the Judiciary Committee, I want to thank you for giving me the opportunity to testify today.

My name is Gary Freeman and I live in Hutchinson, Kansas. As you know, I am not a constitutional scholar. I am not a legal expert. I am a husband and father, and someone who works hard everyday to earn a living -- as a treatment plant operator in South Hutchinson. I am also a man who loves his country, a man who spent two years fighting for America in Vietnam, and an American who feels very deeply about our nation's Flag and about the principles that the Flag has come to represent.

You know, while I was in Vietnam I saw a lot of people who were not free, who did not enjoy the simple freedoms that we take for granted here in the United States. I saw a government that oppressed the people, not a government of the people, for the people, and by the people. The Vietnamese did not know what true freedom meant then. And they still don't know what true freedom means now. But -- as an American -- I was weaned on freedom. I tasted freedom every day of my life.

When I was in Vietnam, I saw children who drank, bathed, and washed their water buffaloes -- all in the same river. I saw mothers who washed their children's clothes and used the same water for cooking. I saw people in Da Nang defecate on the streets -- as if it were "no big deal," an everyday occurrence.

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That is why I -- and so many other veterans -- were outraged when the Supreme Court said that our Flag can be burned -- that it can be desecrated by anyone at anytime -- that it can be thrown away like some old wash rag.

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After all, our children are the leaders of tomorrow. They need good examples set for them. They need our nation's leaders to stand up for the Flag and for the cherished principles that the Flag represents. Mr. Chairman and other distinguished Senators, the legacy of our nation -- a legacy that our children will inherit -- is in your hands.

Thank you for your kind attention.

The **Chairman**. Thank you.

Colonel, I know you were over at the War College giving a speech, and it was obvious you had to rush over here. You can either catch your breath or go now, whichever way you would like to go.

Colonel **Summers**. Let me just catch my breath a minute and defer to Mr. Warner.

The **Chairman**. OK. Welcome.

STATEMENT OF JAMES H. WARNER

Mr. **Warner**. Thank you, Mr. Chairman. I want to thank you and the committee for letting me come in this morning and give my testimony.

I have come this morning to speak against the constitutional amendment, Mr. Chairman. It is not because I like detestable people, but because I am mindful that the same God that gave me freedom gave freedom to detestable people and did not give me dominion over their opinions.

The constitutional amendment, Mr. Chairman, I believe, would be dangerous to the Bill of Rights. The Bill of Rights was put into the Constitution, not as a legal prohibition upon what government could do, but as a reminder to government that there is a moral prohibition against what it may legally and morally do to its citizens.

The authors of the Bill of Rights were mindful that governments are prone to have periodic episodes of irrational fear, and they put it in specifically for that. History has proven them right.

In the administration of John Adams, the Alien and Sedition Acts were passed. In this century, in the administration of Woodrow Wilson, Eugene B. Debbs was put in prison by irrational fear, and later, after World War I, Attorney General Palmer waged his infamous raids on the Socialists in this country.

In World War II, irrational fear caused the interment of Japanese-Americans. In the early fifties, and this one comes close to our home, in the early fifties, Senator McCarthy waged his campaign based upon irrational fear.

The **Chairman**. In this very room.

Mr. **Warner**. In 1954, my father-in-law was fired from his job as a public school teacher because he took the fifth amendment before the House Un-American Activities Committee.

Mr. Chairman, if we take this first step and make an amendment to the Bill of Rights, how long will it be before the next wave of fear sweeps over us, and somebody again steps forward and says here is another special case? And, after that, another wave of fear, and then there will be another special case, and what then will be the state of our liberties?

Mr. Chairman, I think that we failed to take into account the awesome power of the idea of freedom to defend itself.

Rose Wilder Lane, in a magnificent book, "The Discovery of Freedom," talks about the power of the idea of freedom. According to Ms. Lane, the fundamental conflict in human history has been, on the one hand, between those who believe that some external authority has a claim on our allegiance, and that this external authority, whether it be master and slave, or whether it be emperor and subject, but this external authority can somehow guide our lives, and we should allow ourselves to be submissive to it and merge into its will.

And, on the other hand, there is what she called the idea of freedom, which is really an understanding of two corollary truths, that all men are brothers, and that all men are born free.

Ms. Lane says that eventually the idea of freedom will be triumphant but it will be a long time. And that it has found finally a home in this country where it has begun to grow.

I have seen the power, Mr. Chairman, of the idea of freedom. In 1970, after the unsuccessful commando raid at Sante, we were taken to the Central Political Prison in downtown Hanoi, the Wahlo prison, the one we called the Hanoi Hilton. One group of Americans was——

The CHAIRMAN. When you say "we," who are you referring to?

Mr. WARNER. Prisoners of war.

One group of Americans was put into a cell with a common wall with a group of Vietnamese political prisoners. We knew that something had caused them to bring us downtown, but we were not sure what it was. In this common wall, there was also a common window that abutted the wall, and if one were very careful, you could pass notes behind the bars of the window without being seen by the guards patrolling outside.

After 3 days, an unknown Vietnamese political prisoner passed a note through the bars that explained what had happened. It was a crudely drawn picture of a man in a parachute. The parachute was labeled "U.S.A." His feet were touching down on a place called Sante, and the caption in broken English said, "Good boy, good boy, good boy, U.S.A."

Mr. Chairman, the walls in this prison were this thick. Our finest, most modern battle tank could not have crashed through those walls. But the idea of freedom got through there as though the walls did not exist.

In North Vietnam, one of the most repressive totalitarian societies upon earth, in a prison in North Vietnam, where even tenfold were the repressions and restrictions upon belief that deep in the heart of this prison there was a man who understood that all men are brothers and all men are born free. And by that idea penetrating into him, it did more damage to the dreams of totalitarianism than any tank we could have sent in there.

Mr. Chairman, this idea is powerful. If we look around us, we see what progress it is making in the world today. But there are still pockets of darkness, there are still places where the dreams of authority, the dreams of despotism are still dreamed by twisted and sickened bitter old men who still hate freedom.

I feel an urgency about expediting the course of the idea of freedom. Let me explain why.

My most vivid recollection of my imprisonment is of the sickening, deadening terror that would grip us when keys rattled outside our door and it was not time to be fed. An earlier generation of Europeans referred to this as the midnight knock on the door.

I do not have the words to describe what that feels like, but I can give you some perspective.

In the summer of 1969, I was tortured. The reasons are not important. It started in early May. By the middle of July, I was in a little box——

The CHAIRMAN. You were tortured you say?

Mr. WARNER. Yes, sir.

I was in a little box out in the sun. I was in leg irons. My feet had swollen to where the leg irons were beginning to cut off circulation. The leg irons were wired to a small stool. I could only squat on this little stool. I was hotter than I have ever been in my life. I had dysentery. I was weak. I had not slept in 7 days.

Early that morning, the keys rattled outside my door, and it was like an epiphany, like Saul on the road to Damascus, because I realized the depths of this fear. I was already in pain so I wasn't afraid of them putting me in pain. And frankly, Mr. Chairman, at that moment if I had been threatened with death, I think it would have been preferable.

It was not a fear of pain, it was not a fear of death. It was a fear of something more profound than any of this. The idea of authority, as I said, is to subsume the individual into this external——

The CHAIRMAN. Do you mean to tell me you were in a box in shackles, in the sun, unable to stand up even because the box was so small?

Mr. WARNER. No; I could have stood up, but the leg irons would not let me. If I stood up, it would bind in.

The CHAIRMAN. So you could not stand?

Mr. WARNER. Yes, sir.

The CHAIRMAN. And after being there 7 days, when you heard the rattle of the keys, instead of saying, thank God, they are going to open the door and I may get out of this box, your instinct was, oh, my God, what is going to happen?

Mr. WARNER. Yes, sir.

This fear, Mr. Chairman, goes beyond pain or beyond the fear of death. It is a fear of losing the meaning of one's own personal existence. And even as we speak, in places in this world, there are men and women who still feel the grip of that fear.

Totalitarian, despotism, I have likened in the past to a beast that eats men's souls. And if we want to serve the flag, if we really want to serve what the flag stands for, we should resolve to slay the beast.

We have in our hands the most awesome, the most powerful weapon that the world has ever seen. Flags are burned, men and women are tortured, because this beast fears above all things in the universe, the idea of freedom. All we have to do to pay honor to our flag is to live in freedom, to set the example, to show the world what freedom means by our every public act to show that we are faithful to this notion that all men are brothers, and that all men are born free.

If we do that, Mr. Chairman, this thing cannot withstand. It may not be in my lifetime, it may not be in the lifetime of my children. But if we resolve to live in freedom and set the example, then, at some point in the future, the morning will come when all the world is free. And on that morning I truly believe that the hymn of thanksgiving that comes up from all humanity will be in whatever tongue they speak, several different reiterations of that broken English that my unknown comrade sent to us, "Good boy, U.S.A."

The **Chairman**. Thank, you very much.

Colonel.

STATEMENT OF HARRY G. SUMMERS

Mr. **Summers**. It is a very difficult speech to follow. I agree completely. I think Mr. Warner——

The **Chairman**. Would you mind pulling that microphone up because the acoustics are horrible in here.

Mr. **Summers**. I must say I agree completely with Mr. Warner. I find it also a very hard speech to follow. He was very eloquent in his remarks.

I think one of the things we have in this issue is a generational gap. I think there is a difference in perception of the veterans of World War II and the Korean War to some extent, and the Vietnam War.

I happen to sort of span that gap. I am a combat entry veteran of both Korea and Vietnam.

But my first reaction when this fear began over the burning of the flag, and the Supreme Court decision was, "Where were all these voices 20 some years ago when every bozo in town was burning the flag?" I didn't see any great outrage then. In fact, members of this Senate, Senator Fulbright is a shining example, held these people burning the flag up to great admiration, as a matter of fact.

So that, in a sense, I was kind of outrage where was the furor then when it was a much more serious issue back in the sixties when all the protesters were burning flags and no one seemed to be saying anything about it.

I detest people who burn the flag. I find it a despicable thing. But I share the apprehension over the constitutional amendment. And my feeling, as I had expressed before the House, was if you want a constitutional amendment, it ought to be one banning lawyers from coming within 1,000 years of their Constitution on any grounds. That ought to be absolutely forbidden. [Laughter.]

The Constitution and the Bill of Rights were written for Americans by some very brave people for all Americans to understand. And it did not take a college degree, or maybe even a high school diploma to read the Bill of Rights and understand what they meant. They were written in very plain language for everybody to see.

And I think the movement to encroachment [illegible] those rights by symbolic speech is a very dangerous path, and it ought to be headed off that not only flag burning, we are going to put that under that symbolic speech, we are also going to put campaign contributions, protection of pornography, God knows what, become symbolic speech, and I think it weakens the Bill of Rights when take it away from its original meaning, that is the protection, the absolute protection for freedom of speech.

So that those are really the grounds upon which I think that a constitutional amendment is a mistake. I think we ought to leave the Constitution alone, and we particularly ought to strip it from much of the verbiage that the lawyers have added over the years to make it very profitable perhaps for them, to make it more obscure that only they can understand it.

And I think it ought to be put back as a document for the people that the average American citizen can read it and understand it, and know precisely what it means.

Having said that, I think that the legal approach that is of the law, passage of the law, if one can be found that is constitutionally sound to prohibit desecration, I think I would support that.

The people that are doing this are doing it knowing full well what they are doing. In other words, if it did not bother us, they would not bother doing it. So that they seized on something that I find despicable, and we ought to be able to devise laws to forbid that sort of thing.

Thank you very much.

The CHAIRMAN. Thank you very much.

Let me begin in the order in which you testified.

Mr. Freeman, you made a very eloquent and obviously heartfelt statement, and you have been very honest with the committee.

May I ask you to honestly respond to the following question?

When you were standing on the street corners of Hutchinson getting signatures or however you got the signatures—and we do not doubt for a minute that they are all legitimate and you got them all, and people felt strongly about it—if you had said, "Would you please sign a petition urging Congress to pass a law to stop the burning of the flag," do you think you would have got any fewer signatures, honestly?

Mr. FREEMAN. I do not know if we would have got any fewer signatures. I am sure there would have been more of a question.

When we made up our sign, it said to sign a petition against any kind of desecration of the American flag. And we did not approach anybody, they approached us. And then they would ask us the question, is this to stop burning the flag? And we would say yes. And they said good, then we will sign.

If it had been for burning the flag——

The CHAIRMAN. Oh, I understand that.

Mr. FREEMAN. We would have been strung up.

The CHAIRMAN. Yes; no, I understand that. I don't think anybody, including Mr. Warner, suggested we should be for burning the flag. But I am just trying to get a sense of where this goes.

Let me ask you, Mr. Warner, how do you answer the criticism if anybody dare say it to your face, the criticism of those who suggest that your being against a constitutional amendment somehow reflects that you do not feel as strongly about what the flag stands for? How do you answer that criticism?

Mr. WARNER. Well, Mr. Chairman, I believe that by saying that—now, first, I should preface this when I say I do not want to ban flag burning. I should make it very clear that I mean burning one's own flag.

Apparently Mr. Johnson burned somebody else's flag.

But provided that one's own flag, even though it is extremely offensive to me and everyone else that I know, or anyone whose company I would care to keep, nonetheless, that is the right of the individual, and the flag is supposed to represent that the individual has that right. It represents an unswervable granite rock, which should be the Bill of Rights under which people who are very offensive are protected.

The idea, after all, of the Bill of Rights is that offensive people be protected. If we were thinking of the Methodist Sunday School in Des Moines, IA, we would not have to have a Bill of Rights because they are unlikely to offend anybody. We are talking about detestable people. And they are the ones whose rights have to be defended.

So if it should seem, and if I should lose favor in people's eyes if it should seem that I am somehow less dedicated to the flag, then that is a small price to pay, I think, for speaking up on behalf of what I think to be the right thing.

The **Chairman**. I am not suggesting people do.

Mr. **Warner**. Yes, sir, I understand.

The **Chairman**. I am not suggesting people do. It is interesting that the only Congressional Medal of Honor winner in the Senate, and I do not know whether it is the only one, I guess there have been others that served, I do not know the answer if any other Congressional Medal of Honor winner has been a Senator before, I do not know that, feels equally as strongly and is equally as articulate as you. And then, again, other Vietnam prisoners of war, like the distinguished Senator from Arizona feel differently.

So, it is obvious there is no uniform view which gets me to my last question to Colonel Summers.

You stated something that I have been wondering about, about the generational notion of this. It is interesting that all the official organizations—I say all, I think all the major organizations—that testified, all say that if a statute would do it, fine, because I think the implication is they do not like the notion to tinker with the Constitution if they do not have to.

Some say if you have to do it, some say if you have to, don't do it. Is it in your view—how—this is getting a little bit into more psychology I guess—well, as a man who served in the combat capacity in two different wars that, in a sense, span a generation, a number of Korean War veterans were also World War II veterans as opposed to brand new veterans. But very few of the Vietnam War veterans, very few, were also World War II veterans.

And so the generation seemed—you seemed to have served with sort of both generations here.

How would you explain why the Vietnam Veterans Organization says—organization, not all Vietnam veterans—the Vietnam Veterans Organization says no constitutional amendment as opposed to the American Legion, which also has Vietnam veterans, says constitutional amendment? How do you explain that? Just the way the question is asked or the nature of the membership or——

Mr. **Summers**. Just before I get into that, one observation I want to make.

One of the problems we have here is Dr. Samuel Johnson said every man is entitled to express his own opinion. Then he went on to say then every other man is entitled to knock him down for it.

Part of the problem we have is we are no longer entitled to knock him down for it. So we get into these kind of questions.

But, back to your question, I think the Vietnam veteran fought a very different war than the Korean War veteran and the World

War II veteran. That is, the enemy tried desperately, and I think Mr. Warner could testify, that they used our own symbols against us; that the protestors, the skulkers and the draft dodgers deliberately went out and burnt the flag and used it against the people who were serving. They used—the speeches of some of our Senators and some of our Representatives were used against people trying to convince them that their own symbols had turned against them. And the Vietnam veteran knew better than that. He knew the symbols were important, certainly all of them I think were various symbols. But they knew that America was more than the symbols, that they were fighting for the United States, for their country——

The CHAIRMAN. I see.

Mr. SUMMERS. And the fact that people were burning flags was sort of irrelevant in that we did not let it get to us I guess is one way of putting it. So that the outrage against that is not quite as strong, having seen it before and having lived through it, the outrage is not quite so strong as it is perhaps for another generation who the symbols were revered and were used in support of them, and not against them.

The CHAIRMAN. Do you think there is any difference in intensity of patriotism that exists between Vietnam veterans and World War II veterans?

Mr. SUMMERS. Well, I used to think about, for example, the ROTC cadets that grew up during the Vietnam era. They must make the best officers we have ever had, having gone through that sort of ordeal of fire, of being cast upon and discriminated against, and all the rest during that period. That really must have been an ordeal for them to go through.

I think the Vietnam veteran ordeal they went through strengthened them, and I think their patriotism is certainly as strong, I would not say any stronger, but certainly as strong as any group of veterans we have ever had.

The CHAIRMAN. It is kind of a digression I realize, but it is interesting. I was curious how you viewed that. I appreciate that.

I yield to my colleague from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Freeman, we are pleased that Senator Dole brought your efforts to our attention, and that you were able to be with us today.

Earlier, Ms. Stout of the Vietnam Veterans of America, testified that while veterans groups oppose a Johnson decision, they do not support a constitutional amendment to achieve this objective.

Do you feel this is an opinion shared by most veterans who served in Vietnam?

Mr. FREEMAN. I can only speak for the veterans that I have talked to on this. There were quite a few veterans, World War II and Vietnam, that signed the petitions.

They have a very strong opinion. I would say I probably talked to over 100 of them. And I would say maybe 2 out of 100 said a constitutional amendment is what we need. The other—two or three maybe, they were undecided but they knew it wasn't right.

Senator THURMOND. They what?

Mr. FREEMAN. They knew that it was not right the way it was going now.

Whether they was for a constitutional amendment or what, they did not say. But all the rest of them was for the constitutional amendment change.

Senator **Thurmond**. What percentage of veterans did you talk to for a constitutional amendment?

Mr. **Freeman**. I would say 98 out of 100.

Senator **Thurmond**. Ninety-eight out of a hundred?

Mr. **Freeman**. Yes, sir.

Senator **Thurmond**. That includes all veterans that you talked to?

Mr. **Freeman**. Yes, sir.

The **Chairman**. And you spoke to about 100 veterans?

Mr. **Freeman**. Yes, sir.

Senator **Thurmond**. As you and your wife gathered signatures for your petition for a constitutional amendment, and I commend you for that, what was the general sentiment of the people you approached?

Mr. **Freeman**. Well, like I said, we did not approach anybody. They approached us.

Once they found out that this petition was against desecration of the American flag——

Senator **Thurmond**. They came to you?

Mr. **Freeman**. Yes, sir.

Senator **Thurmond**. I see.

Mr. **Freeman**. That was one of the agreements at the places that we set our table up, that we would not solicit; that they would read the sign and come up to us. And this is what——

Senator **Thurmond**. And about 98 out of 100 was in favor of what you were doing?

Mr. **Freeman**. Everybody that signed the petition was in favor of what we was doing. Some of them would ask, well, now, what is this for? And we would tell them. And they would say, well, you mean anybody burning the flag? And I told them that like burning in demonstrations and any kind of desecration. And they said sure. And they would sign it. No problem.

Senator **Thurmond**. Now, did you choose to get your petition our for a constitutional amendment instead of a statute because you wanted to be sure you would get results?

Mr. **Freeman**. No.

Senator **Thurmond**. Whereas, the statute, you might get results, you might not. A constitutional amendment would guarantee results.

Mr. **Freeman**. The petition, they had a Vietnam veterans reunion in Eldorado, KS. I picked up a copy of that petition there. I took that petition to Hutchinson, KS, and I was going to have some of my friend and my relatives to sign it if that was what they wished.

I got to thinking about it, and I said, well, why don't we see how many other people want to sign it. And that is how it got started.

Senator **Thurmond**. Yes; what I am driving at is this. You favor a constitutional amendment, as I understand?

Mr. **Freeman**. Yes, sir.

Senator **Thurmond**. And you support that over a statute because you feel like it will ensure results. Whereas a statute might get results, you are sure a constitutional amendment will get results, is that it?

Mr. **Freeman**. Yes, sir.

Senator **Thurmond**. That is all.

Thank you, Mr. Chairman.

The **Chairman**. Well, gentlemen, I want to thank you very, very much. You are all—and it is presumptuous of me to even say it—you are all obviously extremely loyal Americans who believe in the values that we all say the flag stands for. This is evidence of the fact that we are the kind of country we are.

Not a lot of countries hold hearings on this kind of thing. And you stand for the best that there is. And we all owe you a debt of gratitude, and I am not being solicitous, I mean it sincerely, for the service you have given to your country.

And all of us wonder how in God's name you all did what you did. And Mr. Warner, it is still beyond my comprehension, beyond my comprehension how somebody could have gone through what you went through, what John McCain went through, and scores of others, our former colleague from Alabama went through, and still have enough optimism and faith, regardless of your position, to stay deeply involved.

The one thing, I guess, what it has attempted to do is to take away your faith, your sense of optimism about life. And obviously you still possess it. And again it sounds a little corny, but you enrich us all. You enrich us all because you feel it, regardless of that your position is on the issue.

We are going to try to do our best to reach a honest, workable, decent consensus on what must be done. And as the old saying goes, I guess that is what we are getting paid for up here. Hopefully, we will earn our salary, and we will do it with some dignity on this issue because I know that is what everybody is looking for.

Again, thanks so much for the extra effort you all made. I appreciate it.

The hearing is adjourned.

[Whereupon, at 1 p.m., the committee adjourned, subject to the call of the Chair.]

MEASURES TO PROTECT THE PHYSICAL INTEGRITY OF THE AMERICAN FLAG

THURSDAY, SEPTEMBER 14, 1989

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:13 p.m., in room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Thurmond, Kohl, Metzenbaum, and Simon.

OPENING STATEMENT OF SENATOR KOHL

Senator KOHL [presiding]. This hearing is called to order.

This is the final of our four hearings on the flag. Our first panel this afternoon has three distinguished witnesses. First is Walter Dellinger, professor of law at Duke University. Professor Dellinger is a recognized expert in the field of constitutional law, and he has taught at Duke since 1969.

Next is Gordon Baldwin, professor of law at the University of Wisconsin Law School. Professor Baldwin has an extensive background and experience in the areas of constitutional law and international law.

The final member of the panel is an old friend of mine, Brady Williamson. Brady is a lecturer in constitutional law at the University of Wisconsin Law School. In addition to teaching, Mr. Williamson devotes a substantial part of his time to day-to-day litigation of constitutional and, in particular, first amendment issues.

We welcome each of you here today and we very much look forward to your testimony. Let's start with the statement of Professor Baldwin and Mr. Williamson. Your written statements, gentlemen, will be made a part of the record.

Senator THURMOND. I have a very brief opening statement, Mr. Chairman.

Senator KOHL. Senator Thurmond.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Chairman, today we begin our fourth and likely final hearing on legislative efforts to overturn the Supreme Court's decision in *Texas* v. *Johnson,* which, of course, allows the desecration of our American flag.

Immediately after that decision, proposed constitutional amendments and statutory language were introduced to reverse the *Johnson* decision. We have heard from many distinguished witnesses on this issue and are fortunate to have additional constitutional scholars with us today.

Mr. Chairman, it has been my opinion that a constitutional amendment is the most sound and prudent course to follow as we seek to correct this decision. After hearing testimony, public debate and other general discussions, I continue to firmly believe that a constitutional amendment is needed to insure the integrity of our American flag.

I do not ascribe the so-called conventional wisdom of some political pundits who say that interest in this issue has waned with the American people. Daily, I receive letters urging congressional action to overturn the *Johnson* decision. Also, many resolutions which were adopted by city councils and prominent civic groups opposing the Supreme Court decision and demanding reversal continue to come into my office.

If the fervor and outrage over the *Johnson* ruling appears to have lessened, it is because the national media has moved on to other issues. The allegorical respect and pride that millions of Americans have expressed for their flag has not dissipated over the course of one hot summer.

While the Supreme Court is entrusted with deciding constitutional issues, the Congress has not prohibited and should not be intimidated from expressing its own interpretation of what is allowed under the Constitution through legislation or proposed constitutional amendments.

With a proposed constitutional amendment, of course, the ultimate power lies with the American people, through their State legislatures. Three-fourths of the State legislatures must ratify an amendment before it becomes a part of the Constitution.

Mr. Chairman, it is my belief that in this instance the Congress should swiftly pass a proposed constitutional amendment and allow the American public to express their sentiments for making our proposal a part of the Constitution.

We have distinguished witnesses to hear from today and I look forward to hearing their testimony.

Thank you, Mr. Chairman.

Senator KOHL. Senator Metzenbaum.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. Mr. Chairman, thank you very much. I will make a very brief statement.

This is the fourth day of hearings held by the Judiciary Committee regarding proposals to bar desecration of the flag. It is no secret that I oppose both the constitutional amendment and the legislative statute barring flag desecration.

The proposed constitutional amendment represents an unprecedented dangerous attempt to curtail the freedoms protected by the Bill of Rights. In its current form, the legislation proposed here in the Senate is probably unworkable and could make harmless private behavior a crime.

But I am sympathetic to those who are trying to approach this problem through the legislative route. That is a far more responsible course. I am not going to repeat in detail my arguments against both the constitutional and the legislative proposals we are considering here, but I would like to say a few words about where this issue stands today and why we are dealing with it.

From the beginning, I have made clear my belief that this issue is being driven almost entirely by the politics of patriotism. The Supreme Court's decision last June has not produced an epidemic of flag burning, it has not prompted an outbreak of unpatriotic demonstrations, American values and American security are not being threatened, and it is also clear that the American people have not risen up en masse and demanded that Congress jail flag burners or amend the Constitution.

Yes, there was a reaction of strong outrage in the immediate aftermath of the Court's decision, the public was outraged and offended by Gregory Johnson's contemptible act. I share them and still share that outrage. But the fact is that the public is not clamoring for us to tinker with the Bill of Rights, in order to put down a nonexistent scourge of flag burning.

I took a position on this early and I expected to be criticized and I have been, but not nearly as much as I had anticipated. I have also heard from scores of Americans who love the flag, but do not want to see the Constitution amended or freedom of expression curtailed.

I was back in Ohio during the recess. I heard considerable concern about rugs, the budget deficit, and the savings and loan bailout, but I did not hear much about the flag. In fact, I did not hear hardly anything, and I was not alone. News reports indicate that few legislators were pressed on the flag issue while home for the August recess.

So, what is driving this issue? The answer can be summed up in one word—no, I think it is two words—one word is "fear," and the second word is "politics." It seems we cannot summon enough political courage to say to our constituents that protecting free speech means protecting even expressions which we find wrong-headed, outrageous and offensive.

The sad truth is that the Bill of Rights is being held hostage by fears of negative 30-second spot TV spots in next fall's elections. Think of it: In more than 200 years, through a Civil War, the Great Depression and two World Wars, we have never amended, altered, or diminished the freedoms granted in our Bill of Rights. But today we are seriously considering cutting back on the first amendment, in order to avoid giving our opponents an issue in the next election.

No one doubts that every single Member of the House and Senate and every single American, save for a tiny handful, loves and respects the flag. Every day, legions of Americans show their love and respect for the flag by flying it over their homes and yards. They display their reverence in the best and most eloquent way—quietly, routinely, and voluntarily.

Congress does not need to pass a law or amend the Constitution to stand up for the flag. The American people stand up for the flag every single day, without our help. And here in Congress, I believe we stand up for the flag every day when we go out there or in these committees and vote in accordance with the dictates of our conscience.

Respect for the flag is not under siege. Indeed, the outrage provoked by Gregory Johnson's cowardly act has spurred a renewed commitment to the American flag. But I think more and more Americans have come to recognize that it is not necessary to enshrine that commitment in the Constitution, especially when to do so could jeopardize the values and freedoms for which the flag stands.

Thank you, Mr. Chairman.

Senator KOHL. Thank you, Senator Metzenbaum.

At this point, without objection, an opening statement of Senator Grassley will be placed in the record, at his request.

[The statement of Senator Grassley follows:]

STATEMENT OF SENATOR CHARLES E. GRASSLEY
SEPTEMBER 14, 1989

MR. CHAIRMAN, THIS IS THE LAST OF THE COMMITTEE'S SCHEDULED HEARINGS ON THE PROPOSALS WE ARE CONSIDERING TO PROTECT THE FLAG.

I WANT TO FIRST THANK YOU AND COMMEND YOU FOR THE EXPEDITIOUS AND FAIR MANNER IN WHICH THE HEARINGS HAVE BEEN CONDUCTED. I BELIEVE THEY HAVE BEEN VALUABLE TO BOTH THE JUDICIARY COMMITTEE AND TO THE SENATE.

OUR DELIBERATIONS HAVE FOCUSED ON WHETHER OR NOT THE SUPREME COURT DECISION OF LAST JUNE -- TEXAS v. JOHNSON -- SHOULD BE OVERTURNED;

AND, IF IT SHOULD, BY WHAT METHOD -- CONSTITUTIONAL AMENDMENT OR STATUTE.

THE VAST MAJORITY OF AMERICANS, AND MOST OF OUR WITNESSES AGREE THAT THE SUPREME COURT WAS WRONG IN THE JOHNSON CASE, AND THEY WANT US -- THE CONGRESS -- TO ACT.

ALTHOUGH I AM A SUPPORTER OF THE CHAIRMAN'S STATUTORY AMENDMENT, S. 1338, I -- LIKE MY DISTINGUISHED COLLEAGUE FROM SOUTH CAROLINA, SENATOR THURMOND, AM NOT CERTAIN THAT IT WILL SURVIVE A FURTHER LEGAL CHALLENGE.

THE ARTICLE THREE FEDERAL COURTS CANNOT HAND DOWN ADVISORY OPINIONS. THUS, AT THE VERY LEAST, IT WILL TAKE A NUMBER OF YEARS TO DETERMINE WHETHER A STATUTE WILL PASS CONSTITUTIONAL MUSTER. AND SUCH A DETERMINATION CAN ONLY COME FROM A "CASE IN CONTROVERSY" OR PROPER TEST CASE.

LIKE MY COLLEAGUE FROM UTAH, SENATOR HATCH, I AM ALSO UNCOMFORTABLE WITH ATTEMPTING TO OVERTURN A SUPREME COURT DECISION - GROUNDED IN THE CONSTITUTION - BY THE PASSAGE OF A STATUTE.

THE FACT IS THAT NO STATUTE IS GUARANTEED EITHER EXPEDITIOUS REVIEW OR AUTOMATIC CONSTITUTIONALITY. THAT'S ONE OF THE REASONS WHY I PREFER THE CONSTITUTIONAL AMENDMENTS WE HAVE BEFORE US.

THEY WILL NOT CHANGE THE CONSTITUTION -- AS MANY CRITICS HAVE CHARGED -- RATHER THEY WILL RETURN US TO THE STATUS QUO, BEFORE THE COURT'S DECISION.

AND I THINK IT IS WISE TO REMEMBER THAT AS SERIOUS AND AS THOUGHFUL AS OUR DELIBERATIONS MUST BE IN ATTEMPTING TO CHANGE THE CONSTITUTION, THAT GREAT DOCUMENT IS NOT INVIOLATE. THE FOUNDING FATHERS - TO THEIR CREDIT - PROVIDED FOR AMENDMENTS, ALBEIT THROUGH A MOST CUMBERSOME PROCESS - AND PROPERLY SO.

THE HEARINGS HAVE REINFORCED MY BELIEF THAT WE ARE OBLIGED TO RESPOND TO THE SUPREME COURT. I DON'T TAKE SUCH A REPSONSIBLITY LIGHTLY.

I LOOK FORWARD TO THE TESTIMONY WE WILL BE HEARING TODAY AS WE WORK TOWARD A SOLUTION TO RESTORE AND RE-ESTABLISH THE STATUS QUO PRIOR TO THE SUPREME COURT'S DECISION IN TEXAS v. JOHNSON.

THANK YOU.

Senator KOHL. We will begin with testimony. I would like to remind you that your full statement will be made part of the record, so we would like to request that you keep your testimony down to 5, no more than 10 minutes.

Professor Baldwin.

Senator METZENBAUM. May I say to the witnesses, I am excusing myself, but not from a lack of interest but just the fact that I am due at another committee where I am afraid they will do wrong things if I do not get there. Excuse me, please.

PANEL CONSISTING OF GORDON B. BALDWIN, PROFESSOR OF LAW, UNIVERSITY OF WISCONSIN LAW SCHOOL; WALTER DELLINGER, PROFESSOR OF LAW, DUKE UNIVERSITY SCHOOL OF LAW; AND BRADY C. WILLIAMSON, LECTURER IN CONSTITUTIONAL LAW, UNIVERSITY OF WISCONSIN LAW SCHOOL

Mr. BALDWIN. I quite understand, Senator. Thank you, sir.

I thank you, Senator Kohl and members of the committee. I am honored to be here, and I approach the problem that the proposed constitutional amendment and the proposed statute present from the viewpoint not only of a law teacher, but as a lawyer.

I do not think it is a partisan issue. I think it is a tough legal issue. I oppose a constitutional amendment, for several reasons, which I will try to summarize by way of footnotes to the prepared statement.

I believe that if there is a problem, and I think it is clear from my reading, at least of the newspapers that I read and the friends I talk to, there is a problem, interest is keen on the flag business, at least in my part of Wisconsin—that a change in the statutes, not a constitutional amendment, would do an adequate job.

It is not novel to conclude that constitutional amendments are not always necessary. I think there are clearly four amendments to the Constitution that were designed to overturn Supreme Court decisions, and I think in two of those instances it turned out to be unnecessary. The two, of course, are the 11th amendment, which has been pretty well emasculated by judicial construction and by the Congress and by statutes, and the second is the income tax amendment, which is probably unnecessary, in lieu of the Supreme Court's implicit and now explicit rejection of *Pollack* v. *Farmers Home*. So, it is not novel to conclude that the constitutional amendments might be unnecessary.

The Congress, it seems to me, by proposing an amendment, does not accomplish its purposes. For one thing, the consequences of a constitutional amendment are almost unpredictable. The proposed amendment does not prevent anything. It simply says Congress has power to protect the flag from physical desecration. Well, I think that power already exists. In other words, the proposed constitutional amendment does not begin with the word, "Notwithstanding the Bill of Rights, Congress can make laws and the States can make laws punishing flag desecration." It does not say that.

The problems that a constitutional amendment would present are pretty much the same as the problems that a statute presents today. A statute has to be reasonably precise, it has to give adequate notice of what conduct the law forbids. We have that problem, whether we have a constitutional amendment or not, we have the problem of vagueness. We have the problem of overbreadth. A statute should not give administrators too much—and I underline "too much"—discretion. We have that problem of avoiding overbreadth, too much overbreadth, whether we have a constitutional amendment or take the statutory route.

Furthermore, it is a pretty well recognized principle statutory construction that you try, the courts try to reconcile, harmonize conflicting constitutional values. And so, even with the constitutional amendment, I would ordinarily predict that a court would try to harmonize a violation of the statutes a construction of the statutes with first amendment values.

In other words, what I am saying is that we still have problems, very much the same set of problems if a constitutional amendment route is followed as we would if a statutory route is followed.

The statutory route has also this merit and perhaps this demerit: I think it is arguable—and I would prefer to argue this side—that a Federal statute forbidding flag desecration would preempt and displace State flag desecration. My authority for this is a reading of *Pennsylvania* v. *Nelson,* about 35 years ago, a decision in which the Supreme Court held that the States lacked constitutional power to prevent sedition to deal with espionage. The Court said that the Pennsylvania laws on subversion and so forth were displaced by national laws dealing with subversion and the States had no business dealing with this issue.

Senator **THURMOND**. Mr. Baldwin, if you do not mind, we can hardly hear you. Would you speak closer into the microphone, just a little bit louder?

Mr. **BALDWIN**. Sure. Sure.

Well, I am suggesting that there is a possibility, a real possibility that Federal flag desecration legislation would preempt State legislation on the same subject. In other words, the interests that suffered when a flag is desecrated are the interests of the Nation and the national symbol, and while the State might very well enforce that Federal interest by enforcing the Federal statute, it is not clear to me that a separate State statute would pass constitutional muster under doctrines of preemption.

As I say, I think it is a tough and is a controversial question, but it is one of the merits of the flag statute that you have before you, that it would provide uniformity, and it is one of the problems that it might very well act as a preemptive strike on the legislation of 50 States.

I have no further comments on the statement. I think my colleague will complete the summary.

[The joint statement of Professor Baldwin and Mr. Williamson follows:]

Prepared Testimony
Thursday, September 14, 1989
Senate Judiciary Committee

2:00 P.M.
Room 325
Russell Office Building

Gordon B. Baldwin
Brady C. Williamson

Two hundred years ago, almost to the day, the First Congress adopted the First Amendment as part of the Bill of Rights. In a constitution designed to establish a central government with explicitly limited powers, the Bill of Rights expressed the most conservative principle in political philosophy. It guaranteed individual rights and liberties. The first ten amendments have done just that for two hundred years and, for good reason, no one has given serious thought to amending them. Until now.

This Congress, the one hundred first, has before it a proposed constitutional amendment intended, some of its proponents maintain, to amend the First Amendment to give Congress and the states the "Power to Prohibit the Physical Desecration of The Flag of The United States." The amendment--it would be only the seventeenth since the Bill of Rights--arises from a single reprehensible act by one man in Dallas five years ago and the decision of the U.S. Supreme Court, announced on June 21, 1989 in Texas v. Johnson, that he could not be convicted under the Texas flag desecration statute. This is the fourth and final series of hearings by this Committee on the wisdom of that proposal to amend the Constitution and the statutory alternatives.

The Proposed Amendment

The House of Representatives now has passed the Flag Protection Act of 1989 (H.R. 2978), similar to the legislation introduced by the chairman of this Committee. So the Congress has not one but three choices on this issue. It can approve the proposed amendment, adopt flag protection legislation, or take no action at all--at least for now.

Should the Congress adopt the proposed constitutional amendment to "reverse" the Supreme Court's decision?

We oppose a constitutional amendment to overturn the Supreme Court's decision in Texas v. Johnson. A change in the statutes, not an amendment, could adequately protect the flag. It is not novel to conclude that constitutional amendments sometimes are unnecessary. In only four instances has a Supreme Court decision been displaced by a constitutional amendment but, in retrospect, it appears that two of them were not necessary. The Eleventh Amendment was unnecessary because the courts developed useful tools to impose federal obligations on the states, and the Sixteenth was unnecessary because the Supreme Court reversed the offending decision.

There have been thousands of constitutional amendments proposed, including an amendment offered in 1970 to protect the flag, but Congress has sent only 33 to the states. Virtually all of the 16 amendments ratified since the Bill of Rights have involved a fundamental proposition: the abolition of slavery, the election of presidents and senators, equal protection, voting rights for women and young people. Indeed, even the amendments rejected by the states--most recently, the equal rights amendment--have shared that characteristic.

Chief Justice Rehnquist was correct in his dissenting opinion in Texas v. Johnson in citing the flag as the unique symbol of this country, a symbol entitled to protection. Yet the importance of the flag is not at issue. The issue is what should be done to foster respect for the flag and, at the same time, honor the purposes of the Bill of Rights. No one challenges the flag by challenging this proposed amendment, nor by asking whether it shares the fundamental characteristics of the first 26 amendments.

The Congress should not adopt the proposed amendment but for two reasons far less theoretical: it would not accomplish its purpose and it is not necessary.

There is no doubt about what the proponents of the flag amendment want to do. Appalled by the Supreme Court's decision, they want to give the federal government and the states "wide latitude," in the words of Assistant Attorney General

William P. Barr, "to prohibit that conduct toward the Flag that they believe deserves protection." That conduct would, of course, include expressions of opinion now protected by the First Amendment. But the proposed amendment might not have that effect at all.

The proposed amendment itself prevents nothing. It only enables the Congress and the states to enact legislation to prohibit the "physical desecration" of the flag. For those people quite properly concerned about the need for a "prompt" response to the Supreme Court's decision, the amendment is a curious solution. It surely would lead to a patchwork of statutes with different and even contradictory definitions of "desecration" and "contemptuous conduct." Moreover, it would leave the law in this area unsettled for a decade.

The Congress first would have to approve the amendment, which then has to be ratified by the states. Next, the Congress and the states would have to enact appropriate legislation. That time-consuming process, in each of the states and in the Congress, will be followed by an avalanche of litigation in the state and federal courts and the inevitable appeals. Some courts almost certainly would reach different results, applying different standards.

Not only will the courts review the legislation to ensure that it is neither vague, nor overbroad, nor a violation of equal protection, but they will analyze the amendment itself under one of the most important principles of judicial review. They will try to construe it in harmony with the First Amendment. Notwithstanding the legislative history of the proposal, there is no assurance that the courts will read this new 27th Amendment in a fashion that substantially limits freedom of speech in the manner desired by its proponents.

Our point is this. Many, if not most, of the problems inherent in a flag destruction statute would exist even if the proposed constitutional amendment were ratified. Any statute still would have to be precise, not overbroad or vague. The flag would have to be defined, and the territorial reach of the law determined. Let us then focus on the real problem, drafting a sensible and constitutional statute. We believe that can be done.

Congressional Authority

Congress already has the "power to prohibit the physical desecration of the flag" and other national symbols by statute. They have exercised that power in similar settings. Federal law already prohibits the destruction of currency, the vandalism of monuments, even the commercial use of the flag, and Congress can continue to exercise that power. Neither the Congress nor the states need fear judicial intervention as long as they exercise their existing power in a manner that does not violate constitutional principles. The Supreme Court itself made just this point in Texas v. Johnson. And so can this Congress.

In a term filled with controversial decisions, the flag case may prove to be the most-discussed and the least-precisely read. The Supreme Court affirmed a decision of the Texas Court of Appeals invalidating the misdemeanor conviction of Gregory Lee Johnson under a state law for burning an American flag. Texas defined flag "desecration" through the eyes of the beholder. Johnson was convicted for mistreating the flag "in a way that [he knew would] seriously offend one or more persons likely to observe or discover his actions."

The statute was vague and overbroad, but its greatest flaw was that it punished the expression not of any point of view but the expression of only one point of view, defined as "offensive" by the beholder. It was not content-neutral. "The Texas law is...not aimed at protecting the physical integrity of the flag in all circumstances," the Court held, "but is designed instead to protect it only against impairments that would cause serious offense to others." That is what made the statute unconstitutional.

Lost in the debate over what the Court did in this case is what it did not do. The Supreme Court did not establish a new constitutional principle. It did not limit the ability of government to punish disorderly conduct or to prohibit theft, arson or fires in public places. It did not license flag burning. It did not overturn every federal and state flag statute. And it most certainly did not, as the Assistant

Attorney General suggested it did, hold that "the Government's interest in protecting the Flag as a symbol of our national unity can never be sufficiently compelling to overcome an individual's First Amendment interest in burning the flag for communicative purposes." (Emphasis added.) We are astonished that the Justice Department construes a Supreme Court decision so broadly when a narrow construction of its ruling is available and obvious.

The legislation adopted by the House of Representatives and the legislation before this Committee are content-neutral on their face. Unlike the proposed constitutional amendment, they are specific and immediately enforceable. Unlike the Texas statute, they are "aimed at protecting the physical integrity of the flag in all circumstances." The legislation could be applied uniformly, moreover, to prosecute Gregory Lee Johnson for what he did during a political convention in Dallas as well as someone who abused the flag during a demonstration against black Americans in Bensonhurst.

The Proposed Legislation

Are the statutes before the Committee constitutional? Even if they might be, are they desirable?

Notwithstanding the literal language of the First Amendment, "Congress shall make no law....," government at every level regularly enacts legislation that incidentally limits speech by focusing upon conduct rather than words and by neutral, not content-related, restrictions. Congress can prohibit the destruction of draft cards even in the name of free speech. Cities can ban billboards and, the Supreme Court held just last year in a case from Wisconsin, some limited residential picketing as well. Even political speech, at the core of the First Amendment, is not immune from reasonably drawn and evenly applied time, place and manner restrictions.

The Supreme Court's treatment of speech varies with the nature of the restriction and with the subject and even the form of speech. The First Amendment gives commercial speech, the Court repeatedly has held, less protection than speech on matters of public interest and concern. It views absolute prohibitions on speaking with far more skepticism than limitations by time or place or manner. It has reserved its "most exacting scrutiny," of course, for legislation that punishes or deters speech based on the content of that speech. Yet it also has acknowledged the difference between "pure speech"--the written or spoken word--and "symbolic speech" or expressive conduct like burning a draft card, flying a flag upside down, or wearing it on the seat of pants. Indeed, several justices, including Hugo Black, would have afforded symbolic speech or expressive conduct virtually no protection at all from government regulation.

Faced with H.R. 2978 or S. 1336 or legislation like it, the Supreme Court would ask two determinative questions: Is the statute really content-neutral? Whether or not the statute is really content-neutral, is there a governmental interest sufficient enough to justify its impact on speech?

The legislation is content-neutral on its face, of course. There are no references to contempt, derision, or the reaction of anyone. Yet the flag is a unique symbol of the country and its system of government. And it is difficult to imagine any "use" of the flag--whether waving a flag to honor it or burning a flag to try to defame it--that does not carry some message and, almost invariably, a political message.

Even content-neutral legislation that punishes anyone who "knowingly mutilates, defaces, [or] burns...." the flag may, in effect, punish only that speech that expresses contempt for the flag or everything it represents. Yet the Supreme Court will not analyze the statute in a vacuum. Its decision in Texas v. Johnson focused on the statute as applied. The new law enacted by the Congress will be tested on its face and as applied. But as long as an element of the offense does not require proof of an expressive purpose or proof of an expressive impact on a viewer the statute probably would survive constitutional attack.

While the proposed legislation does not have the constitutional flaws of the Texas law, this Committee has heard several distinguished witnesses argue that the Supreme Court would not approve this statute. We find this difficult to accept because the legislation before the Committee is content-neutral, at least on its face, and for at least one of the justices in the

5-4 majority of Texas v. Johnson that might be sufficient to distinguish and validate this statute. Justice Kennedy explicitly noted in his concurring opinion that the case involved political speech, and that it was important to remember that "the flag protects those who hold it in contempt."

The proposed legislation focuses more precisely on conduct itself rather than on the expressive impact of the conduct. That, too, distinguishes it from the Texas law and that, too, might be a sufficient distinction for at least one justice.

Federal Pre-emption

The authority of the Congress, as opposed to an individual state, to regulate the use of a "unique symbol" of national government may be exclusive. The Court consistently has allowed the Congress to legislate in some areas with far more deference than it allows the states. Just as the states may not constitutionally enact anti-subversive legislation, the Supreme Court might hold that states may not enact laws protecting the flag of the United States. If there were a valid federal statute, however, the states' lack of power would not be important. It would be possible for the federal law to allow state prosecution, and this committee might consider whether or not the federal law should, or should not, be pre-emptive.

The Supreme Court's decision in Texas v. Johnson rests on a long line of precedent. Given the composition of the Court's majority, it is unlikely to be overturned. This legislation responds directly to the Court's concerns, however. It differs substantially from the Texas "desecration" statute. And those differences, coupled with the relatively non-controversial speech decisions by the Court over the last 30 years, might well be sufficient to sustain it.

The Committee should consider several steps to improve the constitutional integrity of the proposal. The Court repeatedly has emphasized the importance of alternative avenues or methods of expression in analyzing statutes that restrict speech. The Committee could recommend narrowing the definition of "flag" in 18 U.S.C. § 700(b) by specifically describing the size or shape or color or substance of the "flag." Gregory Johnson burned a full-sized American flag that had been flying on a pole outside of an office building. Would his expressive conduct have had the same literal or legal impact, either then or now, had he burned a plastic flag 3 x 5 inches in size on a five inch stick?

The Committee also might consider expanding the protection afforded the flag from commercial abuse in 4 U.S.C. § 3. That kind of legislation would emphasize the genuine interest of the Congress not in suppressing speech but in protecting the integrity of the flag as the unique national symbol that it is.

That leaves the question of the desirability of enacting even constitutional legislation. In light of Texas v. Johnson, the current statute (18 U.S.C. § 700) would be very difficult, if not impossible, to enforce. Yet that decision leaves unaffected a host of other methods for punishing the abuse of the flag even when it involves the overt expression of political opinion--disorderly conduct, theft, arson and public nuisance regulations, for example. Our concern over the enactment of new flag legislation lies, in the final analysis, as much with its practical impact as with its constitutional soundness.

Any legislation almost certainly will encourage, in a handful of troubled people, the very kind of reprehensible conduct it is meant to deter and to punish. The proposed constitutional amendment in this regard will have a far more harmful effect than the enactment of a single federal statute, of course, because the amendment will foster legislation in every state, inviting protest and inevitably desecration. Indeed, one of the most compelling arguments for the federal statute is that it will provide a single, national standard and avoid the greatest disadvantage of the amendment.

The Committee has approached this issue with the caution and care that it deserves. The flag is a unique national symbol. It ought to be protected. Whether that protection is best provided by a law or by the competing force of respect for the flag is a difficult question that involves political as well as legal issues. We are convinced, however, that the legislation before the Committee best recognizes and reconciles the two compelling principles of Texas v. Johnson: the importance of free speech and the importance of the flag as the national symbol.

Gordon B. Baldwin is a professor of law at the University of Wisconsin-Madison. Brady C. Williamson lectures there in constitutional law and practices with the Madison law firm of LaFollette & Sinykin.

2:W-PT(W3)

The CHAIRMAN. Mr. Williamson, welcome. It is good to see you again and thank you for taking the time to come.

I apologize to the panel. The reason I was not here—and I think this is the first hearing in Lord knows how long on this issue I have not been here for the entirety of it—we are in the midst of attempting to begin the process between Democrats and Republicans and the Congress and the White House to deal with the drug strategy, and the first meeting of that took place, at least thus far, so I apologize for being late. That is the only reason.

It is good to see you, Brady. You are good to come back. It is kind of like an old haunt to you, though, but welcome back and welcome to this room again.

STATEMENT OF BRADY C. WILLIAMSON, LECTURER IN CONSTITUTIONAL LAW, UNIVERSITY OF WISCONSIN LAW SCHOOL

Mr. WILLIAMSON. Thank you, Mr. Chairman. The last time you and I saw each other, the context was slightly different, but I would like to think that the overall goal remains the same.

In a term filled with controversial decisions, the flag case may prove to be the most discussed and the least precisely read. The Supreme Court affirmed the decision of the Texas Court of Appeals invalidating the conviction of Gregory Johnson under a State law for burning an American flag, but Texas defined desecration through the eyes of the beholder. Johnson was convicted for mistreating the flag in a way that he knew would seriously offend someone watching him.

The statute was vague, overbroad, but its greatest flaw, and the flaw that this bill, the bill before this committee does not have, was that it punished the expression not of any point of view, but of only one point of view, defined as offensive by the beholder. It was not, to use a law professor's word, "content-neutral." The Texas law is not aimed at protecting the physical integrity of the flag in all circumstances, the Court held, and that is what made it unconstitutional.

Lost in the debate over what the Court did in this case is what it did not do. The Supreme Court did not establish a new constitutional principle, it did not limit the ability of government to punish disorderly conduct or theft or arson or fires in public places. It did not license flag burning, it did not overturn every Federal and State flag statute, and it most certainly did not, as the Attorney General's representative suggested it did, hold that the Government's interest in protecting the flag as a symbol of our national unity can never—repeat, never—be sufficient compelling to overcome an individual's first amendment interest in burning the flag for communicative purposes.

The legislation adopted by the House on Tuesday and the legislation before this committee are content-neutral on their face. Unlike the proposed constitutional amendment, they are specific and immediately enforceable. Unlike the Texas statute, they are aimed at protecting the physical integrity of the flag in all circumstances. The legislation could be applied uniformly, moreover, to punish what Gregory Lee Johnson did at a convention in Dallas, as well as someone who abuses the flag during a demonstration against black Americans in Bensonhurst.

Faced with this kind of legislation, the Supreme Court would ask two determinative questions, is the statute content-neutral, whether or not it is content-neutral, is there a governmental interest sufficient enough to justify its incidental impact on speech.

While the proposed legislation does not have the constitutional flaws of the Texas law, this committee has heard several distinguished witnesses argue that the Supreme Court would not approve this statute. We find this difficult to accept.

The legislation before the committee is content-neutral, at least on its face, and for at least one of the Justices in the 5-to-4 majority of *Texas* v. *Johnson,* that might be sufficient to distinguish and validate this statute.

This legislation focuses more precisely on conduct itself, rather than on the expressive impact of the conduct. That, too, distinguishes it from the Texas law, and that, too, might be a sufficient distinction for at least one Justice, perhaps Justice Blackmun.

The Supreme Court's decision in *Texas* v. *Johnson* rests on a long line of precedent. Given the composition of the Court's majority, it is unlikely to be overturned. This legislation, however, responds directly to the Court's concerns, it differs substantially from the Texas desecration statute, and those differences, coupled with the relatively noncontroversial speech decisions of the Court over the last 30 years, might well be sufficient to sustain it.

The CHAIRMAN. Thank you very much.

Mr. Dellinger, it is good to see you again, too. You have made great contributions to this committee. It is good to have you back, and please proceed.

STATEMENT OF WALTER DELLINGER, PROFESSOR OF LAW, DUKE UNIVERSITY SCHOOL OF LAW

Mr. DELLINGER. Thank you, Mr. Chairman and members of the committee.

Two-hundred years ago this very day, conferees from the House of Representatives and the Senate of the United States were in conference committee, resolving the final wording of the Bill of Rights. On September 24, 1787, the report of that conference committee was submitted to the House, which approved the wording of those amendments, including the first amendment.

Now we are faced with the question of whether, for the first time in two centuries, we will alter the Constitution in a way that limits the first amendment for the first time. No such amendment has ever been proposed, even by a single House of Congress, much less ratified and made part of our fundamental law.

I will suggest today that a simple act of Congress protecting the physical integrity of the flag in all circumstances has a very reasonable basis for being sustained in the U.S. Supreme Court, and that a constitutional amendment is a truly terrible idea.

First, briefly, on the statute, it is, of course, common sense, basic constitutional law that Congress may not by statute "overturn" a constitutionally based decision of the U.S. Supreme Court.

But it is equally simple Hornbook constitutional law that Congress is free to correct any flaw that may have rendered an act of Congress unconstitutional, in response to a Supreme Court decision. That does not in any way abridge the principle of *Marbury* v. *Madison.* Indeed, where Congress responds to a decision of the Supreme Court that points out a flaw in a statute by removing that flaw, it is acting very much in accordance with the direction the Court has indicated, and we have seen several examples of this in recent years.

The Supreme Court held the Gramm-Rudman Act unconstitutional, because of a flaw in the statute. Congress responded with new legislation that did not contain the invalidating flaw.

In the structure of the Campaign Finance Act, the Supreme Court held portions of that act unconstitutional, in *Buckley* v. *Valeo.* Congress responded by correcting the constitutional flaw.

This past term, the Supreme Court held, in *Sable Communications,* that an act of Congress dealing with dial-a-porn was unconstitutional, because it reached too broadly, beyond obscene speech, and did not pursue less restrictive alternatives, and I have no doubt that, in time, Congress will indeed pass legislation correcting the constitutional flaws in the previous telephone pornography statute and that the Court will sustain the statute which has removed those flaws.

So, it can be done. I think I will not spend further time on it, because Professor Williamson and Professor Baldwin have set this out. The flaw that is corrected is the flaw that the Texas statute and the United States statute did not make flag burning a crime, they did not make flag destruction a crime. They made it a crime under the Federal statute to cast contempt. That was the heart of the statute. That is the operative language, "no person shall cast contempt." That is clearly an antiexpressive statute. And in the Texas statute, it all turns on what message is being communicated.

The statute presents a novel question of whether there is a legitimate governmental interest in protecting a symbol against all kinds of destruction, no matter what message is being expressed, and regardless of whether there is any message being expressed at all. And whatever doubts one may have in constitutional theory about a statute, I agree with both of my colleagues on this panel that the Supreme Court has indicated in its opinion that it would sustain such a statute, and I would think we would take the Court at its word before, in a sense, going nuclear in this question with a constitutional amendment proposal.

But let me use this few minutes of my time, because I know that all three of you gentlemen will have questions for us, to deal with the constitutional amendment proposal.

I think at this point, after all of these hearings, one question looms over every other aspect of this issue, and that question is does the President's proposed amendment override the first amendment, or does it not. That question has been raised by witnesses before this committee and before the committees of the House of Representatives. It has not been answered by any person speaking for the administration, and it would be an act of utter responsibility——

The CHAIRMAN. Irresponsibility or responsibility?

Mr. **Dellinger**. An act of irresponsibility.

The **Chairman**. We are looking for an act of utter responsibility. [Laughter.]

Mr. **Dellinger**. Well, it is hard to find, either in academic life or in your business, those rare acts for which we may search forever, Senator. [Laughter.]

It would be utterly irresponsible to propose to the States for ratification an amendment to the Constitution, without any answer to the question of whether it is intended to override the first amendment or other aspects of the Bill of Rights.

Now, this is a very serious question. The amendment—how would you answer that question? You could look to the text of the amendment, and there you find one clear answer, and that clear answer is no, it does not override the first amendment and, therefore, it does not lay a finger on the Supreme Court's decision in *Texas* v. *Johnson*.

The President's proposed amendment says, simply, "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States." As it reads, it would serve one very minor function: It would make explicit that Congress had jurisdiction to legislate respecting this subject. That everyone has always assumed, that Congress has legislative jurisdiction under one of its enumerated powers to legislate on this subject. But it would be just like the other powers of article I, section 8.

At the House Judiciary Committee, I said that if we were to place this amendment somewhere in the Constitution—that was Madison's first notion, that you would go back and revise the text of the Constitution with amendments, rather than adding them at the end—where would we put this amendment? We would put it at the end of article I, section 8, that lists the powers of Congress: Congress shall have the power to levy and collect taxes, to regulate commerce, to provide for the punishment of counterfeiting, and this new power, Congress shall have the power to prohibit the physical desecration of the flag.

All of those powers are fully subject to the first amendment, and this applies, as well, to those amendments which are added later in time. The 14th amendment, adopted in the 1860's, gives Congress those powers, but those are subject still to the first amendment.

The **Chairman**. Let me interrupt you just for a brief moment, and we will extend your time, only for a moment because otherwise I will forget it.

As a followup, can you give us, to sustain that point, which is obvious, but can you give us a listing of cases where the first amendment has superseded the power granted to Congress or has modified that power in a way that has turned back the assumption that some make, that if it were in the body of the Constitution it would not, in fact, be impacted upon by the first amendment in this case, if you could augment your statement?

Mr. **Dellinger**. Yes, I think it would take a very trip through any standard constitutional text to come up with such a list. I mean, we know that the fact that Congress has the power to enforce the 14th amendment does not give Congress the power to require every newspaper to run an editorial supporting equality every day. It would be, in fact, very appropriate within your jurisdiction to enforce the equality provision of the 14th amendment so to require. The amendment would give you the "power" legislative jurisdiction to do it, but this particular use of that power would, of course, be inconsistent with the first amendment.

The **Chairman**. Thank you.

Mr. **Dellinger**. Well, at least one of my colleagues, Professor William Van Alstyne, well known to this committee, and a truly distinguished scholar, thinks that one's analysis of the amendment should stop right at that point. It does not do any harm at all, it leaves *Texas* v. *Johnson* in place; unquestionably does not say it overrides the first amendment, so it is subject to it.

If one takes a different view, that this cannot be right, even though the amendment, as it is written, is fully subject to the first amendment, and even though after I have raised this question in the House hearings, the administration has not seen fit to modify it, to say that, notwithstanding any provision of the first amendment, Congress' power may be exercised, notwithstanding any objection based on freedom of expression or freedom of the press.

The issue is still avoided, and it in a sense leads into a second issue: If the sponsors of the constitutional amendment intend that it in some sense override the first amendment, how much of the first amendment? Does it totally override the first amendment and all other provisions of the Bill of Rights? That cannot be the case, because the Assistant Attorney General, Mr. Barr, in his very effective statement, indicated that any Federal or State legislation under this amendment would be subject to the void-for-vagueness constraints of *Smith* v. *Goguen*, one of the Supreme Court's flag decisions.

Now, it was based on a void-for-vagueness doctrine that is really derivative of the first amendment, so that if it is subject to some parts of the first amendment, what parts?

Finally, what this means, I think, is that, far from having the amendment being a simple and quick solution to a problem, even after ratification, it will create an entirely new jurisprudence of the 27th amendment.

We know that the statute Biden-Roth-Cohen raises novel questions, or at least a novel question, but at least we know the first amendment jurisprudence will be applied to that question. We do not know what kind of jurisprudence will be applied under the 27th amendment, we do not know to what extent the first amendment will apply, I do not know what the results would be, and neither does anyone else, because the administration has simply declined to address this problem.

Thank you, Mr. Chairman.

[The statement of Mr. Dellinger follows:]

TESTIMONY BEFORE
THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
WASHINGTON, D.C.
CONCERNING

CONSTITUTIONAL AND STATUTORY RESPONSES TO TEXAS V. JOHNSON

PROFESSOR WALTER DELLINGER
DUKE UNIVERSITY LAW SCHOOL
THURSDAY, SEPTEMBER 14, 1989

MR. CHAIRMAN, AND MEMBERS OF THE COMMITTEE:

Two hundred years ago today, members of the first United States Senate and House of Representatives were meeting to agree upon the final wording of the proposed Bill of Rights. On September 24, the work of that conference committee -- perhaps the most important ever held by Congress -- was presented to the House. Final agreement had been reached to propose an amendment adding the following words to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, of abridging the freedom of speech or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

No amendment has ever been proposed by Congress that would alter in any way this most fundamental part of the Constitution. Today this committee meets to consider for the first time in 200 years an amendment that would revise the Bill of Rights we adopted two centuries ago. Because I believe that the proposal to amend the Constitution for this purpose is utterly misguided and fraught with peril, I have accepted the committee's invitation to appear.

I will suggest that (1) that a simple act of Congress "protecting the physical integrity of the flag in all circumstances" by prohibiting all flag-burning and similar destruction would not necessarily be inconsistent with the Court's opinion in Texas v. Johnson; and (2) that the proposed amendment to the Constitution of the United States is a truly terrible idea.

I. STATUTORY RESPONSES TO TEXAS V. JOHNSON

Although my own view is that a statute imposing criminal punishment for the burning of a privately owned flag may be insufficiently tolerant of dissenting views[1], I agree with Dean Geoffrey Stone of the University of Chicago that there are at least reasonable grounds to believe that the United States Supreme Court would in fact sustain legislation "protecting the physical integrity of the flag in all circumstances."

A majority of the present members of the Supreme Court have voted to uphold criminal convictions for misusing the United States flag. Four Justices (Rehnquist, White,

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[1] Although Americans are free either to fly the flag proudly, to ignore the flag, or to express contempt for it, we have, in fact, chosen by overwhelming numbers to fly and display it proudly and to treat it respectfully. And our decision to do so is made far more meaningful by the fact that it is our free decision. The individual choice of millions of Americans to respect the flag would be far less meaningful if it were the only choice one could make to avoid imprisonment by the government. As the Texas Court of Criminal Appeals said, in its opinion overturning Johnson's conviction, "... a government cannot mandate by fiat a feeling of unity in its citizens." Johnson v. State, 755 S.W.2d 92 (Tex.Cr.App. 1988).

O'Connor, and Stevens) dissented in *Texas* v. *Johnson*. A fifth member of the Court -- Justice Blackmun-- has previously voted to sustain a conviction for flag misuse. In his dissenting opinion in *Smith* v. *Goguen*, 415 U.S. 566 (1974), Justice Blackmun stated that the Court should have sustained Goguen's criminal conviction for wearing a small United States flag sewn into the seat of his trousers in violation of Massachusetts' flag-misuse statute. Justice Blackmun interpreted the opinion of the state's highest court as ruling out the possibility that Goguen was convicted on the basis of any "communicative element" and wrote that "I therefore must conclude that Goguen's punishment was constitutionally permissible for harming the physical integrity of the flag...."

The majority opinion in *Texas* v. *Johnson* accommodated Justice Blackmun's view by emphasizing that Johnson was convicted under a statute that made his criminality turn on the communicative impact of his message. The Court, citing to Justice Blackmun's *Goguen* opinion, states "The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others." *Johnson*, Slip. Op. at 13, and fn. 6.

As the Texas Court of Criminal Appeals recognized, Johnson was punished for the expression of an idea. Texas did *not* make it a crime to burn or destroy the American flag. Texas prohibited actions affecting the flag if *and* only if those actions expressed an idea offensive to others. The "governmental interest" in Johnson was thus directly related to the suppression of the message being communicated.

The proposed federal statute (Biden-Roth-Cohen) eliminates the particular constitutional flaw that was the basis for the Court's decision in Texas v. Johnson by changing the federal statute from one that punishes the expression of a "contemptuous" idea to one that simply protects all flags against destruction without regard to the idea being communicated, and without regard to whether there is even any idea being communicated at all.[2] Such a statute would not, of course, not accomplish the objective of targeting for punishment those and only those who express an idea the majority finds offensive. Those who would desire to incarcerate Americans based on the ideas those individuals express will not be satisfied with this statute.

The proposed federal statute would be "related to expression" in the sense that a symbolic, expressive idea is being protected. But it would not necessarily be "related to the suppression of expression." The constitutional issue that would be raised by such a statute is one that the Court has never confronted: may Congress protect a particular symbol --the American Flag -- against all destruction of whatever kind. In United States v. O'Brien, the Supreme Court sustained a statute that prohibiting all instances of burning and other destruction of draft cards -- regardless of whether any idea was being expressed by the destruction -- on the basis of a finding that the statute served various governmental interests in administering the Selective Service System. Those same administrative interests are not present when flags are destroyed. For me, the difficult question of constitutional law (and of policy) is whether a blanket ban on burning the flag can be justified, as the draft card burning statute was, by a governmental interest "unrelated to the suppression of expression." If the purpose of the Flag Protection Act is not to suppress certain ideas, what is the purpose? I have listened carefully to various formulations of that interest; several seem plausible, none seem entirely clear or wholly persuasive. In the end, even though as a matter of constitutional theory I continue to have doubts about the statute, I agree with those who suggest that there is a reasonable basis in the case law for concluding that the Supreme Court would sustain it.

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[2] Much of the criticism of the Biden-Roth-Cohen bill has concerned its possible application to paper cups, napkins or similar items with flags printed on them, or to the crumbling of newspapers containing sales advertisements with pictures of the flag. The problems could be eliminated simply by defining the "flags" that are covered as flags sold or distributed for display.

One final note about the statute: Because it presents such a novel and difficult question, I would have supposed that it was in everyone's interest to have a process of judicial review of the statute that was careful, reflective and orderly. For this reason, the provision in the House

Bill (H.R. 2978) providing for an extreme form of expedited review seems to me very ill-considered. To have this issue immediately rushed to the Supreme Court the instant it is raised in the pleadings at the trial level in a single district court is not a formula likely to produce a wise and reflective judgment on a matter of fundamental importance for the future of the First Amendment. The "issue" would be considered by the Supreme Court stripped of any of the informing context that could be supplied by a full record. Whatever "facts" are available at that premature stage may well be so variant as to distort the adjudication process.

At a minimum that language should be altered to provide for Supreme Court review (bypassing the Court of Appeals) only after a final decision in the trial court. Better yet would be a decision to follow the normal appellate review process, which would provide the Justices of the Supreme Court with the insights and reflection by Judges of the Court of Appeals. It is surely not in the interest of either supporters or opponents of this statute to short circuit the process of deliberation by which its validity should be determined.

II. THE PROPOSED AMENDMENT TO THE UNITED STATES CONSTITUTION

The President of the United States has proposed an amendment to the Constitution of the United States to permit the punishment of those who "physically desecrate" the flag. This potentially dangerous amendment would create an entirely undefined exception to either one, some, none or all of the Bill of Rights; it would place this power in the hands of all future Congresses, fifty state legislatures, the government of the District of Columbia, and perhaps as many as 14,000 local governments; it would set a dangerous precedent for resorting to the amendment process for the curtailment of the rights of the unpopular in general, and for unpopular speech in particular; and it would deprive the First Amendment of much of its moral legitimacy by suggesting that speech that is deeply offensive to most of us will be suppressible, while speech deeply offensive to others must continue to be tolerated.

A. The Amendment Fails to State Which Provisions, If Any, Of the Bill of Rights It Will Override.

One troublesome aspect of the President's amendment proposal is that its text leaves entirely unanswered the absolutely critical question of which provisions of the Bill of Rights it will trump or override. The amendment proposal reads:

> "THE CONGRESS AND THE STATES SHALL HAVE POWER TO PROHIBIT THE PHYSICAL DESECRATION OF THE FLAG OF THE UNITED STATES"

On its face, this amendment does not purport to override either the First Amendment or any other provision of the Bill of Rights. It simply (and unnecessarily) adds an additional basis of legislative authority to the powers conferred upon Congress. Its wording is similar to the power-conferring clauses found in Article I and in the final sections of the 13th, 14th, and 15th amendments. It is thus similar to:

> "Congress shall have Power to lay and collect Taxes..."
>
> "Congress shall have Power ... To regulate Commerce...among the several states
>
> "Congress shall have Power ... To provide for the Punishment of counterfeiting ..." [Article 1, sec. 8]; and
>
> "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." [Fourteenth Amendment, sec. 5]

Each of these granted powers gives legislative jurisdiction to Congress. But the exercise of each of these powers and all other powers granted to the government is limited and constrained by the Bill of Rights.[3] Congress may not, for example, exercise its Fourteenth Amendment "power" to enforce the equal protection clause by legislation requiring all newspapers to promote equality daily in their editorials.

If the President's proposed Twenty-seventh Amendment were read literally, it would do absolutely nothing other than unnecessarily make explicit the authority for Congress to legislate with respect to the flag -- a power that has always been assumed to exist in any event. Nothing in the text of the proposed amendment would exempt the exercise of that power from constraints of the First Amendment. Therefore (on this reading) the Amendment would not alter in any way the Supreme Court's decision in Texas v. Johnson. Any act passed under the Amendment would still have to satisfy the First Amendment, and any statute which, like the Texas statute, made the criminality of burning turn on the nature of the message being communicated, would still be invalid under Johnson. My colleague William Van Alstyne, one of the nation's most distinguished constitutional scholars, believes that the amendment clearly does not override the First Amendment and that its passage would therefore do no harm at all. In his view, Texas v. Johnson would be decided exactly the same way under this proposed amendment because any exercise of the power granted to Congress under the amendment that turned on the communicative message or impact (as the Texas statute did) would continue to be invalid under the First Amendment.

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[3] The Bill of Rights constrains not only powers exercised under the original Constitution, but also powers exercised under Amendments added later in time than the first ten amendments. That is, even though the Fourteenth Amendment was added after the Bill of Rights, it does not override or trump the First Amendment or any other provision of the Bill of Rights.

This does not appear to be what the sponsors of the amendment intend. Unless this proposed amendment is understood to override or trump the First Amendment and other provisions of the Bill of Rights, it does nothing. But if it does override provisions of the Bill of Rights, which provisions does it override? Some of them? All of them? Only the First, but not the Fourth, Fifth, and Eighth? Could a state, for example, in some time of great strife in the twenty-first century, punish flag desecration without having to meet the standards of the Cruel and Unusual Punishments Clause. Could a state, in a future not yet clear to us, dispense with jury trials for flag-desecrators? Could a particularly zealous local government ignore the Fourth Amendment and conduct general house-to-house warrantless searches looking for evidence of desecration?

B. Because The Amendment (and its sponsors) Are Silent About The Critical Question Of Whether And To What Extent It Overrides the First Amendment, The Proposed Amendment Will Produce Uncertainty, Confusion and Conflicting Court Decisions.

The Administration has steadfastly declined to state whether, and to what extent, the powers to be exercised under this amendment would be limited by the First Amendment in particular. Until this critical question is answered, it would be wholly irresponsible to propose this amendment to the Constitution. A wholly new jurisprudence of the Twenty-Seventh Amendment will emerge, and it will be marked for years to come by uncertainty and conflicting interpretations. No issue will be more productive of uncertain and conflicting adjudication that the issue of what, if any, First Amendment defenses may be invoked by one prosecuted for some form of desecration after the proposed amendment becomes law.

Consider a simple, and realistic example, drawn from facts very similar to those in Street v. New York. After the ratification of the administration's proposed Twenty-seventy Amendment, a man is prosecuted under the a statute identical to the present federal statute which makes it a crime to "cast contempt" upon the flag by burning it. The facts show that he is a veteran who was found kneeling over a carefully folded flag he had been given for his service in the military. Solemnly, with tears in his eyes, he quietly burned the flag. On these facts -- virtually identical to Street -- he could not be successfully prosecuted. There is as yet no evidence that he is treating the flag with "contempt" or as other than "sacred" (desecration). The prosecutor, however, proposes to offer one additional, critical piece of evidence: the testimony of a witness who heard the defendant say quietly, just as he began his "ceremony", "If they can shoot James Meredith, we don't deserve a damn flag." The defense counsel objects to the introduction of this evidence (which is obviously critical to the government's case) on the ground that its introduction would mean that the defendant would be convicted for the expression of an idea in violation of the First Amendment.

Would the administration's proposed Flag Amendment permit a defendant who set fire to a flag under these circumstances to be convicted on the basis of evidence consisting of the statement he made about the Flag? I have no idea what the result would be, and neither does anyone else. And the reason we don't know what the answer to this simple question would be is that the spokesmen for the administration will not say whether, and to what extent, their proposed amendment overrides the First Amendment.

This is not a trivial problem. It is drawn from one of the four cases the Supreme Court has decided on the subject. And it will inevitably recur under virtually all statutes passed (or retained) after the passage of the proposed Flag Amendment. It will recur because very often the only basis for determining whether a physical act involving the flag is a legal act or a "desecration" would be evidence of what the defendant said, or what he wrote on a banner, at the time of the physical act.

There are, as virtually every witness has noted, uncertainties about the application of the First Amendment to various acts under various statutes under the Constitution as now written. But at least we know what the basic principles are. The proposed amendment would introduce a wholly new jurisprudence, and thus produce far more uncertain litigation -- especially since neither the text of the proposed amendment nor its sponsors say whether it overrides the First Amendment, and if so, to what extent.

C. The Proposed Amendment Confers Power of Uncertain Dimension on Fifty States and Countless Local Governments

The conferral of power of uncertain scope, cutting for the first time into the Bill of Rights, might be of lesser concern if only Congress were being so empowered. But the proposal also grants fifty different states the authority to enact legislation to prevent flag desecration. And that increases, by fifty times, the risk that harsh and arbitrary legislation might be enacted at some point in the near or distant future.

This provision also creates the possibility that there will be a wide array of different legislative interpretations by different state legislatures of what constitutes "physical desecration" and what constitutes "the flag." Some states may assume that "the flag" includes a picture in a newspaper; other may judge that it encompassed only a cloth version. Some states may assume that placing a flag on a pair of boots, similar to those the President gave to a leader of China, constitutes "physical desecration" of the flag. (Boots, after all, have often been a symbol of repression). Some may assume that an artist's rendering of "the flag" in green, white and orange constitutes "physical desecration"; others may conclude to the contrary.

This raises the question of why it is thought necessary to give to state legislatures (and local governments) any new constitutional power over the subject of the flag of the United States. The national government would seem to be the appropriate branch to determine the proper protection of the national flag. The flag is supposed to be a symbol of nationhood and national unity. Why then submit its regulation to the varying legislative determinations of fifty different states?

D. Adoption of the Proposed Amendment Could Set a Dangerous Precedent for Frequent Resort to the Amendment Process for the Curtailment of the Rights of the Unpopular

The point is a simple one. Quick resort to the amendment process to make criminals out of a handful of very unpopular dissidents is a dangerous precedent. Sober reflection is missing from this process. If this amendment is rushed through Congress and the states, I fear that the appetites of many for quick ways to leap over constitutional barriers will be whetted.

I have argued in the past that the amendment process is a difficult one. [Dellinger, "The Legitimacy of Constitutional Change: Rethinking the Amendment Process", 97 Harvard Law Review 386, at 427-430 (1985)] The principal check, however, has been the Congress. Most of the amendments actually proposed by Congress have been ratified by the states: 26 out of 33, to be exact.

States cannot amend, revise, soften, compromise or substitute for a proposed constitutional amendment. They can only vote to ratify or reject. Up or down. For the flag, or against the flag. In these circumstances it is difficult for state legislators to deflect amendment proposals that are immediately popular. Those that affect only a dissident group will be difficult to resist.

With each amendment of this kind, resistance would be lessened for the next amendment affecting an unpopular group. Proposal of this amendment would dangerously "lower the threshold" at which amending the Constitution is seen as a proper response to a perceived problem. Not only dissidents are at risk. Rights like freedom of the press, which now seem secure, would not necessarily be so in the future.

E. The Proposed Amendment Would Undermine the Moral Legitimacy of the First Amendment

Let us assume that all of the interpretative difficulties of this amendment can be cured, that it does not in fact produce harsh measures and unintended consequences, and that it does not lead to a rush of additional amendments curtailing other first amendment or other rights.

What then will we have done to the fabric of the First Amendment? For two hundred years we have told groups of Americans who are deeply and understandably offended by certain kinds of speech activities that they must tolerate those offensive messages in order to serve the higher goal of allowing expression that is "free, robust and uninhibited." We understand your hurt, we say to them, but we must maintain the fundamental principal that "the government may not prohibit expression simply because it disagrees with its message" (Texas v. Johnson, Slip Op. at 18). But now, when we face the communication of an idea -- disrespect for our flag-- that deeply offends the great majority of us, we quickly pass a Constitutional amendment eradicating the offending expression from public view.

What would this proposed act of constitutional revision do to the moral legitimacy of the stance our Constitution has taken (and will continue to take) in defense of expression that offends many Americans as deeply as flag burning offends the great majority of us? As Professor Arnold Lowey put it to me so well, "What will we now say to the Holocaust survivor who must tolerate neo-Nazi thugs marching through Skokie?" Once we have quickly passed the Twenty-seventh amendment to protect the sensibilities of those who revere the flag, what do we say to those who are particularly offended by, but must continue to tolerate, the burning of crosses by hooded members of the Ku Klux Klan, a brazen reminder of the era of lynching and terror? And what do we say to those who find themselves silenced and marginalized by sexualized (but not constitutionally "obscene") portrayals of women? What enduring Constitutional principle will remain unimpaired that will legitimately surmount these claims, once we have swiftly moved to amend the First Amendment to get rid of expression that the majority of us finds offensive?

III. CONCLUDING REMARKS

It is difficult to imagine a more irresponsible act by this Congress than to send out to fifty state capitols an Amendment to the Constitution for a purpose that could likely be achieved by a statute. Whatever the shortcomings of a statute may turn out to be, they can be corrected, rapidly and easily, by a simple act of Congress. A hastily approved constitutional amendment, once launched, will be largely beyond recall or revision. A statute is thus far less threatening to our constitutional system than the precedent of this amendment, which would be sent to the states after the shortest incubation time of any proposal in this century.

My colleague William Van Alstyne writes that "the Court's flag decision made a liar out of the demonstrator who set the flag in flame." The Supreme Court's decision in Texas v. Johnson said to Johnson: It is not possible to destroy the Flag and the principles for which it stands. You can burn one copy, one version, one replica of the Flag. But you cannot burn THE FLAG. It still flies proudly everywhere, every day, over the land of the free and the home of the brave.[4] The question before this committee is whether you will not propose a hasty and ill-considered amendment that would compromise that freedom and that bravery.

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[4] The Texas Court of Criminal Appeals noted that the State had not shown that isolated acts of flag burning had lessened the value of the flag as a symbol of national pride. Even if the State has a legitimate interest in promoting the flag as a symbol of national unity, the Texas Court wrote in Johnson, the State in its brief "does not aver why the American flag is in such 'grave and immediate danger' of losing the ability to rouse feelings of unity and patriotism such that the Texas statute is 'essential' to prevent its devaluation..." Johnson v. State, 755 S.W.2d 92 at 97 (Tex.Cr.App. 1988). In the five years since Johnson burned a flag in Dallas, there does not appear to have been any noticeable decrease in the American people's devotion to the flag as a unifying symbol.

I urge you not to turn Gregory Lee Johnson into a prophet. The administration's proposal would reward Johnson with his ultimate trophy, the Twenty-Seventh Amendment to the Constitution of the United States. If we adopt this amendment, Johnson will have succeeded beyond his wildest imagination. He will have succeeded in taunting us into grafting a permanent blemish onto our most fundamental constitutional principle. He will have succeeded in making us just look a little silly, and a little less free, and a little less brave.

The CHAIRMAN. Thank you. Thank you, all.

Let me begin with where you ended, Professor. I think that the administration, as well as any one of us, including me, who has proposed a statutory "remedy" to *Texas* v. *Johnson*, are not only reluctant, but are insistent that we are not amending the first amendment, because we know how very firmly, strongly and deeply held the view is that that is one of the rockbeds of freedom and guarantees that exist within this country, ensuring all our basic freedoms.

I pressed that issue from a slightly different perspective with Mr. Barr who, as you said, did a very credible job of making the case for the administration's amendment.

On the one hand, it seems as though there is the argument that, of course, this would clearly and unquestionably allow the States to move to—the State of Texas, for example—to move to, in effect, overrule *Texas* v. *Johnson*, by passing a statute in Texas that could be the very same statute. The argument is that, if this amendment passed, all Texas would have to do was say our old statute, our new statute and, from this point on, if Johnson showed up and did the exact same thing that he did, because he cast contempt, he would, in fact, be guilty.

When I questioned him—and this is really a preamble to a question, but it is the only way I know how to ask it of all three of you—when I pressed the issue of, well, does this not take us further, then, if you take that point, further than what the state of the law was prior to the passage of the constitutional amendment, the very learned and articulate colleague from Utah, who cannot be here today, Senator Hatch, says all we are really doing by constitutional amendment is putting the law back to where it was prior to the amendment.

Now, it seems to me that I am in a catch-22 here, and the reason why they do not make a choice as to whether or not to say it explicitly is intended to amend the first amendment, yet it is granting explicitly the right to the States to do things that prior to the passage of the 27th amendment would in fact have been viewed as in violation of the first amendment.

How do you respond? Give me the best argument you can, because we are all taught in law school and you teach us in law school to argue in the alternative. This is a dangerous question for me to ask, but make the best argument you can for me, for the administration, that *(a)* it is consistent with saying we are not amending the first amendment, and *(b)* we are going to give the States wide latitude to prevent desecration undefined of the flag, in whatever circumstances the States deem to be appropriate.

Professor Baldwin.

Mr. BALDWIN. I will take a stab at that, as a lawyer. You are asking me to be the hired gun, and I will respond as if I were a hired gun.

The CHAIRMAN. Yes.

Mr. BALDWIN. The States, it seems to me, could, given your constitutional proposal, enact or reenact legislation that would deal with flag desecration, but at the same time it is a Federal question as to whether that flag desecration legislation passes constitutional muster under the first amendment or whatever amendment is applicable.

The point is that, while you would be allocating authority to the States to make experiments, you would also be inviting litigation, continued litigation and the continuing development of a jurisprudence, a Professor Dellinger just said, 27th amendment jurisprudence, which would yield some attempt to harmonize first amendment values.

Maybe the Court would say, as Justice Stevens urged in his dissenting opinion in *Texas* v. *Johnson*, that flag desecration is just simply another one of several exceptions to the first amendment. There is nothing strange about exceptions to the first amendment. The copyright law is an exception to the first amendment. The obscenity law is an exception to the first amendment. The defamation law is an exception to the first amendment. Perhaps national security laws are exceptions to the first amendment.

The best case I could make is, OK, there is another exception to the first amendment. Justice Stevens, who is certainly a respected jurist, has thought that there should be an exception to the first amendment, we will have it, up to a point, and we will have to decide what those limits are later on.

The CHAIRMAN. But by definition, you have to agree, as the hired gun for the pro-amendment position, that your intent is to get an exception to the first amendment?

Mr. BALDWIN. Yes, just as we have obscenity as a——

The CHAIRMAN. Yes.

Mr. WILLIAMSON. Mr. Chairman, the point is you have to amend the first amendment to give the States the kind of latitude the proponents of the amendment seem to want to give it. The majority opinion in *Texas* v. *Johnson* said that it was not aware of any special category of jurisprudence for the flag. Yet, the 27th amendment, as proposed, would attempt to create that special category of jurisprudence. The essential flaw, I think, as Professor Dellinger has pointed out, is that none of us thinks it would actually accomplish that.

The CHAIRMAN. Walter, before you respond, Senator Thurmond has an urgent meeting he has to attend and leave for, and I would like to give him an opportunity to make a comment before he leaves or ask a question.

Senator THURMOND. I want to thank you gentlemen for your appearance here and these other witnesses, too, whom I will not get to question. We want to thank them for coming, too.

I just want to say that my position has been that a statute—and my able and distinguished friend here has offered one, and I am going to vote for it, but I question whether it will get results. It might. A constitutional amendment will get results, that will ensure action, so that is my position. It may differ from yours, but I just wanted to explain that to you.

We are glad to have you here, anyway, and we hope you have a pleasant stay and a safe trip back home.

Mr. DELLINGER. Thank you.

Mr. BALDWIN. Thank you, Senator.

Mr. WILLIAMS. Thank you.

Senator THURMOND. I have a few questions that a member of my staff has for the record, if you will get them asked for the record.

The CHAIRMAN. Without objection, we will submit them and I am sure the gentlemen will be prepared to answer them for the record.

I am sorry, Professor Dellinger, I cut you off.

Mr. DELLINGER. That is fine. I was pleased to be offered the hospitality of the city by the senior member on the Republican side.

I would like to ask my two colleagues a hypothetical which I would like to see put to the spokesman for the administration on the question of whether and to what extent this amendment overrides the first amendment, and this is not a far-fetched hypothetical. I take it straight from the Court's first flag burning case, *Street* v. *New York*.

Imagine the 27th amendment has been ratified by the 38 States necessary and is part of the Constitution, and that a State adopts a law like the present Federal law or retains its old law, which makes it a crime to cast contempt upon the flag, and a veteran is seen kneeling in front of a carefully folded flag which he has been given for military service, and he is lighting the flag. He is kneeling in a respectful position and appears quite somber, he is alone, but persons come by the street observe him.

He lights the flag, he is arrested. If he is charged under the present Federal statute and the present New York law, he cannot be convicted on that evidence, that is to say, he has not demonstrated that he is casting contempt upon the flag. We do not know what the message is.

But a witness comes forward and at his trial the witness states, "I heard him say, as he lit the flag, if they can shoot James Meredith, we don't deserve a damn flag." His defense lawyer, under the 27th amendment, says, "You can't introduce that evidence, because you would be convicting him on the basis of what he said." Is that admissible under the 27th amendment or not? I have no idea.

I do not think this is a variant case. This is the very kind of case that will come up, because, under the President's proposal, it is not flag burning that will be prohibited, but statutes that punish those who treat the flag as other than sacred. And the only way you know that is by what they say or the manner, and yet the amendment does not tell us whether the prosecution will be able to admit evidence of what the person burning the flag said or what he or she wrote on a banner.

Do you have any idea how this would be decided under the 27th amendment?

Mr. BALDWIN. The short answer is no, but, of course, the long answer is we can all make suppositions. Your hypothetical, it seems to me, raises the question of what evidence would be relevant, either under the constitutional amendment or, for that matter, under the present statute that is proposed. Under the statute as proposed, I think the best argument is evidence of purpose is not relevant, the prosecution does not have to show any evidence of purpose, and that, of course, raises Senator Metzenbaum's query of "is the statute too broad." Yes, in a way it is susceptible of misuse, I think it is true, but the mere fact of overbreadth does not automatically flunk a statute on constitutional grounds. That is substantially overbroad.

I think, in a civil society, any society worth calling civilized, we must, to a very large extent, rest on some prosecutorial discretion and judicial wisdom, and so I think that the current proposal that you have proposed, Senator Biden, would pass constitutional muster, with a decision in specific circumstances where the prosecution was not required to prove a communicative purpose, but in a case in which the prosecution was wise enough not to convict or charge a kneeling veteran. I think that is a question of wisdom. We have got to leave some play in the joints.

The CHAIRMAN. I must acknowledge, I do not disagree with that, and I must acknowledge, I have repeatedly acknowledged that I cannot say, with certainty, after having sought the wisdom of many of you—some of you in particular, but, in a generic sense, the constitutional scholars of the country, ranging the spectrum from so-called conservative to liberal, which I find hard to define—that the proposal that I put forward would pass constitutional muster.

But it does seem to be that Professor Williamson's comment, that is not often picked up by many, is as I read the decision and re-read the decision and re-read the decision, it seems to me that something comes through very clear that has over the last 200 years come through occasionally on decisions.

One of the features of this decision seems to be an echo that says "change this, there's a way to do this the right way." You could cite for me, I suspect off the top of your head and with any time to be able to refresh your recollections, probably dozens and dozens and dozens of cases where that echo sort of comes through.

Now, obviously, that is not a very precise comment on my part, but it seems that it is there, and I am very worried that, although I would argue—and this is not the appropriate moment nor time—well, it is the appropriate time, but it probably does not warrant the effort—I would argue that it is possible to draft a constitutional amendment that was precise enough that it, in fact, prohibited a specific action with respect to the flag and did specifically provide an exception to the first amendment.

But my worry is—and I mean this sincerely—I find myself in the unorthodox school of those who say that this is worth doing, and if it had to be done by a constitutional amendment, I would consider doing it that way, and I realize most people are either nothing or maybe the statute or constitutional amendment or nothing. I mean, that is kind of how it is breaking down around this place.

But I am genuinely concerned, particularly after the explanation by the administration's witness, that this constitutional amendment is in one sense so broad and gives such wide latitude to the States, that it in fact would allow us, as the administration witness says, to punish conduct. They are not looking at just the conduct of burning the flag. They criticize my statute because it is content-neutral. They say no one wants to do just that. We really want to make a distinction, they say, between the Ku Klux Klan guy who maybe sews the flag across his chest and the anti-Nicaraguan demonstrator who sews the flag on the seat of their pants or, in fairness to them—that is unfair—the distinction between the woman who may have a $4,000 dress, a sequined dress with the American flag imprinted on the dress, and the person who wears the flag on the seat of their pants.

Now, if you take that logic just a few steps, I can picture, as was acknowledged yesterday by those who supported the amendment, that the State of New Hampshire could pass a law saying you cannot use the American flag on any literature that is put out by the Socialist Party of New Hampshire. Any reading of this amendment, it seems to me, would say that the State could do that, unless it is concluded that the State cannot do anything.

Mr. **Dellinger**. Senator, if I just may interject, I think you are absolutely right, since the administration has not addressed this, it is sort of a great either/or here. Either it is a total exception to the first amendment and to other Bill of Rights limits, in which case they could do house-to-house warrantless searches for evidence of flag burning, or punish it more severely if it is intended to criticize the administration in power, and less severely if it supports a conservative or liberal cause, or it does nothing at all, because it is fully subject to the first amendment, and you get these two variant readings.

Mr. **Baldwin**. Or you have a middle position, that you go through another generation of litigation trying to figure out a middle ground, which maybe is the worst possible solution.

The **Chairman**. In the meantime, 4,000 flags or 400 or 4 or 2 flags get burned anyway.

Mr. **Baldwin**. Let me add, Senator, that you do not know what is going to happen with the constitutional amendment. I can think of one case in which notions of equal protection and gender/non-gender discrimination were held to trump the first amendment. It is *Pittsburgh Press* v. *The Pittsburgh Human Relations Commission,* in which the Pittsburgh newspapers previously had published job wanted ads, male preferred and then female preferred, truly gender specific and really quite offensive, but they claimed freedom of the press and the Supreme Court of the United States said no, the gender discrimination principles of equal protection should prevail over this judgment of editorial courtesy.

Well, it is a case I think that is practically decided in a public policy sense, but it is a troublesome in which a subsequent constitutional theory displaced an earlier one. I am skittish about constitutional amendments, in other words.

The **Chairman**. Well, I am getting that picture, and I am not being facetious. I mean, it really started off with a fairly simple notion, it said did you want to use the nuclear solution, but at least when you use, to use the analogy you used, Professor Dellinger, to rephrase your comment, you either try it, you know, with a popgun to do it or a rifle shot, or you use a nuclear detonation. That is what I thought the real debate was.

The more I have gotten into this, the debate seems to be do you use a rifle shot that has a very good chance of striking the bullseye, or do you drop a nuclear bomb that does not correct the problem but kills an awful lot of innocent people. I mean, that is kind of what it is coming out to, it seems to me, on this amendment, but enough, because there are those who strongly support the amendment who are coming next, and the reason I am asking you some of these questions is to give them a preview to think about, to help them make the defense for the case, because I truly am uncertain on this.

Let me yield. I have trespassed on Senator Kohl's time. I again thank him for opening the hearing. Professor Kohl, take whatever time you like.

Senator KOHL. Thank you, Senator Biden.

Professor Baldwin, in your prepared testimony, you state that, just as Congress has protected monuments against vandalism, it can protect the flag with a statute. But it seems that there are relatively few monuments and they are all on government land, whereas there are thousands of flags, many on private property. Does this have any constitutional significance, sir?

Mr. BALDWIN. No, Senator, I do not think it has any constitutional significance. It does raise some practical questions of wisdom. The point I think is that the person who purchases a flag has a bundle of rights, but not all rights. When you own a property, it does not give you total command of that property. You are subject to zoning laws, you are subject to all kinds of nuisance laws and restrictions, and what I think the flag laws do is say those who own the flag have an obligation to treat it properly. You have a bundle of rights, but among those rights is not the right to desecrate.

Just as government, it seems to me, has the power to add to the penalty of those who hit a national monument, add to the penalty of property destruction, just because it offends sensibilities, so I think does the Congress have the power to protect a national symbol which may otherwise be privately owned. But my point is there is no such thing as total ownership.

Senator KOHL. Mr. Williamson, you have gone to court in lots of free speech cases. Let us say Chairman Biden's statute were challenged and you were defending it. What would be your closing argument?

Mr. WILLIAMSON. I think the heart of it, Senator, would be to emphasize the substantial, substantial differences between the Biden statute and the Texas statute invalidated in *Texas* v. *Johnson*.

The legislation passed by the House and, I believe to an even greater extent, the legislation before this committee does not punish speech as such, it does not make criminal conduct dependent on the eye of the beholder, it is content-neutral and it protects the physical integrity of the flag in every circumstance.

I think one of the statute's virtues which has not received a great deal of attention is that it has the potential to eliminate whatever hypocrisy there might be in this debate over the flag, and this is what I mean by that statement. If we are really serious about protecting the flag as a national symbol, then we should be serious about preventing its desecration in all circumstances, not just in circumstances where the political message that some people might perceive is one that makes us uncomfortable, or even one that we find despicable.

Some of us might find quite offensive the abuse of the flag in a commercial context. Some of us might find offensive the abuse of the flag in an artistic context, and the New York times, on its Style section today happened to provide an example of that. There was a picture of a piece of art hanging in a home which was the American flag and upon which was superimposed a cartoon character who appeared to be lighting flames—appeared to be, it is hard to tell, given the quality of the picture in the Times.

But as I said, if we are serious, and we should be serious about protecting the flag, then let us do it in all circumstances, and that is ultimately the redeeming benefit and the overriding virtue of this statute.

Senator **Kohl**. Professor Baldwin, you have made suggestions for improving Chairman Biden's bill to make sure the law would be upheld. For example, you think it would be a good idea to narrow the definition of "flag." Can you briefly explain why that puts strength in the statute, Professor Baldwin?

Mr. **Baldwin**. Well, the definition of a flag and what can be done to it, first, the definition is partly statutory and the definition of what can be done with the flag and what cannot be done for advertising purposes is extraordinarily broad in the statute.

With respect to the definition of the flag, the House version talks about—the flag is defined in terms of what an ordinary person would commonly recognize as a flag, which is somewhat subjective, but perhaps better than anything else that has thus been proposed. What about a lapel pin? What about a stamp with the American flag on it, does the statute cover that? While the stamp is not a flag, it is a symbol of the flag and the statute should not be construed to forbid the desecration of a replica of the flag.

I think maybe the House bill is wise in this respect in that it does leave some play at the joints, I think you have got to have that in the real world, and at the same time does not penalize the person who flips off a lapel pin and throws it on the sidewalk and stomps on it. That is a de minimis and trivial and I hope the statute does not reach that kind of conduct.

Mr. **Dellinger**. I have a comment, Senator Kohl. I think it is wise to narrow the definition of flag in the statute. One of the benefits of a statute is that, you know, if you get it wrong, you can always go back and have Congress revise it very quickly, whereas, a constitutional amendment is going to be beyond recall.

Another is you can put in some precise terms in a statute, and I think we know that the flag's physical integrity ought to be protected like a flag that is up above the chairman, and I would think language something along the lines that a flag means any flag of the United States or any part thereof, made of any textile substance, of any size, in the form that commonly displayed from a flagpole or other staff. If you are going to make it a Federal crime—I mean, it is kind of a long definition, but it means that kind of flag, a small one or a large one, but we do not mean something on a papercup, something on a napkin, something in an automobile sales ad in the newspaper, I think would affect this.

I do not believe that anybody thinks that a Federal penitentiary term is appropriate for a picture of a flag that appears in a newspaper that is crumpled, and this I think—I think this could easily be handled, it is one of the virtues of a statute, do it now, do it later.

Senator **Kohl**. Brady, do you wish to comment on that?

Mr. **Williamson**. Senator, I would just add, I suspect you know this already, but Wisconsin has a flag statute, as do 47 other States, and it really is in two parts. One deals with the mutilation and destruction of the flag, but the other prevents the abuse of the flag in commercial settings.

By taking a hard look at a Federal law that would prevent commercial abuse of the flag, it seems to me that the Congress would be reminding the Court that its goal, a proper goal, is not to suppress speech, but to protect the physical integrity of the flag.

Senator **Kohl**. To all three of you, I was struck by something each of you said. All three of you suggest that the constitutional amendment will not necessarily do what it is meant to, that the Supreme Court might not let the new 27th amendment limit freedom of speech. Are you saying that the first amendment will "trump" the new flag amendment?

Mr. **Dellinger**. That is what the text of the proposed fla[g amendment would indicate. The administration's statement that it turns the clock back to June 20 indicates to the contrary, so I see a conflict between what the administration says the flag amendment is intended to do and what the common, on-the-face-of-it, simple language of it purports to do, which is not very much at all, and nothing that would have any effect on *Texas* v. *Johnson*.

Mr. **Baldwin**. And the other answer is we do not know. We could say, well, we have got some analogies, the notions of equal protection trumped the first amendment with respect to a gender discriminatory ad. On the other hand, the 21st amendment to repeal prohibition was held not to overcome the preexisting notions about State's power over interstate commerce.

So, the answer is you could make some good arguments on either side and, as a cautious person, that is why I urge one to be rather skittish about changes to the Constitution, because, in the long run, we do not know.

Mr. **Williamson**. This is not the first time, of course, that an amendment has been proposed to affect Congress' power with respect to the flag. I believe it was Senator Stevens of Alaska that proposed an amendment in 1970. It did not go very far, of course, but it at least had the virtue of clarity, and I say that in stark contrast to this proposed amendment, because the amendment proposed by Senator Stevens at least began with the words "Notwithstanding any other provisions of the Constitution," and my concern about this amendment, other than the obvious and the basic ones we have been talking about, is that it simply would not do what the proponents seem to hope it would do.

Mr. **Dellinger**. One benefit, if the amendment proposal said "Notwithstanding any provision of the first amendment," it would then indicate clearly that it was subject to the other amendments, the fourth amendment, the fifth amendment, jury trial. But as it is presently worded, we do not know which amendments it is purported that this power will be exempted from.

Senator **Kohl**. Professor Dellinger, at our first flag hearing, the Justice Department witness criticized Chairman Biden's bill for making private conduct a crime. How would you respond? Would his proposal penalize flag burning in one's home? Is that a problem?

Mr. **Dellinger**. Well, it seems to me that this really brings us down to the guts of the issue. If what Congress wants to achieve is to protect the physical integrity of the flag and not merely to punish certain people for having unpopular views, then one very good test of that is whether Congress is willing to say we don't care who you are or what your views are, you may not destroy this particular object. So, I think it is very important to the theory of the statute, that it applies to all deliberate destructions of the flag, whether in public, whether for communicative purposes or not. And unless Congress is willing to support that, then I think Congress is not really serious about protecting the physical integrity of the flag in all circumstances, but is really out to get some people who express views they do not like.

Mr. BALDWIN. Again, I do not dispute Professor Dellinger at all, but there is a certain uncertainty. If there is a liberty interest, a privacy interest that might collide with the flag destruction principles which way would the Court go?

Well, in *Stanley v. Georgia*, the Court said you could watch pornography in the privacy of your home, as long as you did not transport it in interstate commerce or buy it on the street, but you can view it in the privacy of your home.

I do not know how the Court would go. I really do not know, another reason that I am skittish about a constitutional amendment.

Senator KOHL. Are you suggesting that the enactment of a statute is going to create enormous problems that we do not have today?

Mr. BALDWIN. Well, the enactment of a statute will cause problems, it always does. I just do not think those problems are reduced by having a constitutional amendment. I think a constitutional amendment increases the problems, rather than decreases. You have got the problem, anyway.

Senator KOHL. Professor Baldwin, I would like to ask you a question. You are known in liberal Madison as an outspoken conservative. Lee Atwater would have us believe that only Democrats and liberals are against the constitutional amendment. So how does a conservative such as yourself differ from President Bush on this issue?

Mr. BALDWIN. The only way to be a deviant in Madison is to join the Rotary Club, wear a suit and be a Republican. [Laughter.]

I do not think it is a partisan issue, Senator. I approach this from the standpoint of a lawyer and, as a lawyer, I am very cautious, and I think it is a conservative principle to be cautious about tinkering with the Constitution in ways in which you cannot predict the outcome.

Senator KOHL. Thank you, gentlemen.

The CHAIRMAN. Gentlemen, I have a few more questions I would like to pursue. I promised our next and last panel that they will get equally as much time and attention and concern.

This is a very important question. If for no other reason, it is very important to the American people, how we respond to this, and this committee's responsibility is to be just that, responsible in whatever recommendation we make. We have been charged by the Senate explicitly to report back to the Senate on a date certain a statute and a constitutional amendment, whether we are for it against it in this committee, but to report it back, and that is how the process is supposed to work around this place and that is what we are going to try our best to do.

Now, let me pursue a few areas that have been raised by other witnesses, both for and against the statute and for and against the amendment. We heard testimony principally from William Barr, who, as we mentioned before, headed the Office of Legal Counsel at the Justice Department, the principal witness on behalf of the administration, that there is no doubt that my legislation—and I suspect he would say that the legislation that the House passed, I don't know that, though, but he did say specifically the legislation that I have proposed—would be reviewed by the Court under its so-called strict scrutiny standard. Mr. Barr said that when that tough standard is applied, laws are, to use his phrase, "dead on arrival when they get to the Court."

Is it your view—and as succinctly as you could answer it, I would like to ask each of you this—is it your view that the legislation I have proposed or the legislation that the House has passed will, as Mr. Barr suggested, necessarily be reviewed under the strict scrutiny standard?

Mr. **Baldwin**. Well, the strict scrutiny standard is not self-defining. Attorney General Barr is correct in nothing that doctrinally, almost invariably, if the Court says they are going to apply strict scrutiny, they flunk the statute.

The first strict scrutiny case to the contrary is *Koramatsu* v. *United States*, the great infamous Japanese exclusion cases, where strict scrutiny survived.

I do not know, I think the Court might very well say that the Congress has decided there is a compelling interest in protecting the flag as a symbol and the legislation I think might very well survive whatever the Court calls strict scrutiny. It is a label and I find that unpredictable and not a very satisfactory analytical label.

Mr. **Dellinger**. I think it is not at all necessarily the case that the Court would apply strict scrutiny, and I think there is a slight confusion on this point. I thought Attorney General Barr's testimony was extremely informative. On this one point, however, I think there is some confusion.

The Court will inevitably apply strict scrutiny to any statute whose purpose is related to the suppression of expression that is related to suppressing a particular content. Not necessarily is it the case that strict scrutiny would be applied to a statute whose purpose was to promote a certain symbol affirmatively, to promote expression, would not necessarily trigger strict scrutiny. Nor is strict scrutiny necessarily triggered simply because an individual engaged in conduct can show that it is expressive conduct. That is *United States* v. *O'Brien*, the draft card burning statute.

When Mr. O'Brien burns his draft card, he is absolutely protesting the war in Vietnam at a public rally, he is clearly engaging in expressive conduct. What the Court looks to is what is the Government's interest in prohibiting him from burning a draft card. The Government's interest is not related to his message. If the Government statute says we have certain reasons we want everyone to have a draft card in their possession at all times, so that you may not destroy your draft card, no matter what your message, then the Court does not and did not in that case apply strict scrutiny.

The **Chairman**. He further argued—I will ask you the harder question, Professor Williamson, at least hard for me to understand—in fairness to the administration and others, they say, that reading of the Texas statute or the Texas decision, the Supreme Court decision, says that, by definition, any burning of a flag is done for the purpose of expressing a point of view and, further, that because there is language in the decision, unlike the draft card burning case, indicating that there is no legitimate governmental purpose in protecting the flag—this is how the argument goes—and they rely on—and in fairness to Mr. Barr, I am not sure that he relied on this, but we have had so many witnesses, some have said that they rely on that reading, based upon the comment that there is no special place—I am paraphrasing—there is no special place—you fellows will remember the exact language—standing that the American flag holds in our jurisprudence. So, they say there is no special place that this flag sits, No. 1; and, No. 2, what governmental interest could there be, and, Biden, you are arguing that it is a unifying symbol and we are a heterogeneous nation needing unifying symbols is not an adequate purpose, therefore it is not like the draft card burning case, it is distinct from that and it is impossible, therefore, to burn a flag for any reason other than the purpose of expression, no matter what you say you intended. So, if you silently stand there and burn the flag, that is expression, that is communicative conduct, you are communicating a message. How do you respond to that argument?

Mr. WILLIAMSON. Well, first I would say, Mr. Chairman, that you are obviously qualified to teach in law school, because that is the single most draconian issue——

The CHAIRMAN. I may have to do that, to prove that my record at law school did not reflect my capability. I am thinking about doing that, believe it or not, but go ahead. I made my only way out, I cannot go back and get a graduate degree now, it is too late. [Laughter.]

Mr. WILLIAMSON. You really have put your finger on the single most disturbing aspect of any legislative effort in this area. The flag is a symbol, it is a powerful, unique symbol, but it is unlike a draft card, unlike the Washington Monument, unlike other incidents, other reflections of the power and majesty of this country.

It is difficult to imagine any use or abuse of the flag, whether to wave it on the Fourth of July, to honor it, or whether, as Gregory Lee Johnson did, to burn it, to try to defame it. That does not communicate something, because it is inherently a symbol——

The CHAIRMAN. That is the argument.

Mr. WILLIAMSON [continuing]. And it is on that point that the administration's position is most persuasive.

Now, let us put aside the fact that this amendment would not solve that problem, let's put that aside for a moment.

The CHAIRMAN. The constitutional amendment would not?

Mr. WILLIAMSON. Right. Let's get back to the practical question of how the Court would address it. It may well be that the fact that the Biden statute is content-neutral on its face would be enough to permit the Court to apply a lessor standard than strict scrutiny.

Even if the Court did apply the strict scrutiny standard, the effort represented by this legislation, the findings represented by this legislation of the unique place of the flag as the national symbol might be sufficient to provide that compelling State interest that would permit the Court to find this legislation passing the strict scrutiny test.

Let me add one very practical point: We keep talking about the Court. What we are really talking about is one or two Justices, because the decision in *Texas* v. *Johnson* was 5 to 4, and for Justice Kennedy, Justice Blackmun, perhaps for one or two others, these nuances, content neutral on its face, Federal legislation may be sufficient to tip the scales and turn a 5-to-4 decision in *Texas* v. *Johnson* into 4 to 5 or 6 to 3.

Mr. **Dellinger**. It does seem to me that the most difficult problem of the statute that you and others have proposed, Senator, one is difficulty in stating the governmental interest. I mean that is really the tough part and that is the part I have a great deal of problem with. I wish I knew what the Court means when it says that Congress may suggest, that Congress may protect the physical integrity of the flag in all circumstances. If I really understood that, then I would know what the governmental interest is behind the statute.

But the Court does appear to think that there is some kind of governmental interest that is unrelated to the views being expressed by the person who is harming the flag, that Congress can act on. It is very difficult to articulate what that legitimate governmental interest is. There is a symbolic interest, but not an interest that cares about what the destroyer is doing, and I find that a very tough point.

Mr. **Baldwin**. Yes, that is one we have to fit into some kind of article I, section 8 theory. The Court has sort of suggested that there was such a thing in some dicta in *Washington State* v. *Spence*. The Attorney General of the United States, in an opinion rendered in 1925, did about a D+ job explaining the basis for Federal legislation protecting the flag. I think you have to use a resulting powers argument, the powers of Congress to raise armies, provide for a navy, spend for the general welfare, provide for the common defense, regulate interstate commerce, that Congress thinks that a symbol of assistance in legislating to promote those policies in that area, and I do not think the Court would find that that was an unreasonable interpretation.

The **Chairman**. Can it be argued, with any sense of legitimacy, that because the burning of the flag could be done both for the purpose of casting contempt or any negative implication, to communicate a negative notion about the Government, that it also could be done to communicate a positive notion about the Government, a veteran standing before the Memorial of Vietnam, an emotional experience—and I am not being solicitous when I say it, it truly is—burning a flag in honor of and for the bravery of the war dead and offering it up, if you will, as they went up in flames, is that an arguable premise or is that——

Mr. **Dellinger**. Cremation in many countries and in many religions, cremation is a sacred purifying act of honor.

Mr. **Baldwin**. He might have a free exercise defense, then, or we might very well fire any prosecutor who was dumb enough to bring a case. No, I think you have to recognize there is a——

The **Chairman**. The latter would probably occur quicker.

Mr. BALDWIN. Yes. I think you have to recognize there is an overbreadth argument, but in the real world I think that is merely an argument and that we have to rely on good sense, prosecutorial discretion and, in fringe cases, freedom of religion, privacy kinds of claims.

The CHAIRMAN. Let me ask about another case that has fascinated me and one of the few that I remember from law school, the *Schacht* case, which related to uniforms. There is a Federal law that says actors, when wearing the uniform of the U.S. military personnel—I know you know, but for the record—U.S. military personnel could not—wear that uniform in a performance that "tended to discredit the Armed Forces of the United States." The Court struck down this provision because it discriminated against a particular viewpoint, because it was illegal only when the actor sought to cast contempt.

In that case, if the Congress said that actors cannot wear uniforms to praise or to vilify the armed services, period, and there is a law, the only people that can wear a military uniform are those in active military service, constitutionally could we have done that?

Mr. DELLINGER. I think that is one of the strongest analogies in defense of the kind of statutory proposal you have made. You know, the Court seems to say you cannot—the Court goes to such trouble in *Schacht* to find the particular flaw in the statute being that you may not wear a U.S. military uniform replica in a theatrical production if it brings discredit on the Armed Forces, so as to indicate that Congress could say we do not want confusing symbols, Congress could come back and say you cannot use the U.S. military uniform in any production, no matter whether it is praise-worthy or blameworthy. If that is constitutional, then I think the blanket ban on flag burning may be constitutional.

I do think we have to worry about prosecutorial discretion, however, under any statutory alternative, and I think the courts and others ought to be on guard to make sure that any blanket statute is not, in fact, used only against those who are destroying a flag to express a particularly obnoxious point of view and not against others. That would cause concern if that transpired.

Mr. BALDWIN. I agree with the concern, but the Court has in some respect met that concern in *White* v. *United States,* where the Government was able to establish that it was not merely because of the viewpoint of the defendants that they prosecuted those who evaded the draft. But I agree, it is a dangerous concept, but there are a lot of dangerous concepts and I think you have got to have some prosecutorial discretion. We just cannot live in a civil society without allowing some prosecutorial discretion.

The CHAIRMAN. Gentlemen, I have about half a dozen questions that I would like to pursue.

Professor Baldwin, one that I would like to close with, because my time is up here, is that a very distinguished witness came before this committee and said that one of the strongest arguments against legislation, mine or any other, would be that it would be unprecedented in that the Congress has never, as this one witness put it, reversed a constitutional decision by statute.

Mr. **Baldwin**. I think that was former Judge Bork who made that point.

The **Chairman**. That is correct. I heard Professor Dellinger in his prepared statement speak to that. Would you speak to that: Are we reversing a constitutional decision?

Mr. **Baldwin**. No, I do not think we are. I think Professor Dellinger made a lot of good comments on that. When a defect is found in a statute, the Court invites repair. In fact, one of the qualities of the decisions of the Court last term was, more often than not, when the Court said something was improper—including affirmative action and abortion and so forth—what it did was send the issue back to the political process for debate, and I think the flag decision is a quintessential example of the Court striking out a statute and sending the issue back to the public and to you folks for reconsideration and debate, and that is not reversing a constitutional decision.

The **Chairman**. Professor Williamson, did you want to make a comment?

Mr. **Williamson**. Just a brief one, Mr. Chairman. I think it is fair to say that we have rarely seen a decision construed so, if you will forgive the word, liberally. This proposed legislation, as opposed to the amendment, responds directly to the Supreme Court's concerns.

To get back to your question two questions ago, the most important difference in the final analysis between the Texas statute and the legislation pending before this committee is the most obvious difference. That was a State law. This would be an act of Congress enacted into law, passed by both Houses and signed into law by the President.

In case after case after case, the Supreme Court has given the Congress more deference, more room to work than the legislatures of the States, and there is every reason to believe that in this case, dealing not with a State symbol but with the national symbol, that might just find one more vote, simply because it is Congress, rather than the States, that has legislated and has done so in a content-neutral fashion.

The **Chairman**. Well——

Senator **Kohl**. Just one question, gentlemen. If we were to send a constitutional amendment to the States, undoubtedly that would provoke a fierce battle in many State capitals, and would that not further open greater wounds within this Nation? And even if the amendment is ratified, some States will enact flag burning laws and others will not. Isn't that even more divisive than having a single Federal statute?

Mr. **Dellinger**. I would like to second what Professor Baldwin said in his opening statement, in response to that, Senator, which is that the very notion of having 50 different State laws and having as many as 14,000 local jurisdictions empowered to pass statutes under the President's amendment, when the interest is national unity it hardly makes sense to have 14,000 separate jurisdictions having 14,000 different statutes designed to promote "national unity." If there is a legitimate interest there, it is an interest of the Congress of the United States to shape an appropriate remedy.

Mr. **Baldwin**. Obviously, I agree with myself, but I think it is very wise for the Congress to bite the bullet, to enact legislation and to take the responsible position of the leadership position and save the rest of us from having to deal with this at a State level. It is a national problem. It is a national problem, let us deal with it as a national problem.

Senator **Kohl**. I think if the people of this country understood this point—that if you pass a constitutional amendment, you are going to have hundreds and hundreds of local laws, whereas, if you pass a Federal statute, there is just one. That may be one of, if not the most, persuasive arguments in understanding of this whole issue that would tip the thing in favor of a Federal statute. Do you not think so?

Mr. **Baldwin**. Yes, sir.

Mr. **Williamson**. Absolutely.

Senator **Kohl**. Getting that information out, that understanding of what we are talking about, I mean if you did that and then took a national poll, I think the poll would be, well, if you are going to have either one, you are much better off having a statute than a constitutional amendment, because that means 50 laws, 100 laws, 200 laws, or 2,000 laws. Would that be your opinion?

Mr. **Williamson**. Absolutely. There is just no question about it. The other concern, of course, is that if you have a multiplicity of laws, you are going to have a multiplicity of reprehensible incidents to test the law. So, instead of fostering respect for the flag, we would have the not intended purpose, but I think the inevitable purpose of fostering disrespect for the flag.

Senator **Kohl**. Thank you, Mr. Chairman.

The **Chairman**. Being the devil's advocate, because I sometimes find myself disagreeing with myself and, I might add, a distinction from you, Professor Baldwin, I probably have greater reason to disagree with myself. [Laughter.]

How do you respond to those who will say, hey, look, Biden, hey, look, Kohl, we already have 48 statutes on the books in the different States and they are not all the same now, they are all different, there is no uniform statute, how is it going to be any different?

Mr. **Baldwin**. And the Supreme Court has asked us to rethink the issue, I think that is part of the answer, that the Court has forced us to rethink the issue and, on rethinking we may agree that a national standard is the wisest.

The **Chairman**. My view is that all of our States, when they passed the various statutes, all did so with competent or incompetent legal counsel sitting behind the chairperson of the Judiciary Committee in that State legislative body, and the Governor saying: now, look, you only have a limited amount of latitude here, you know, I have to tell you, you cannot go wild on this one, you have to be careful what you pass. Whereas, it seems to me the invitation of the constitutional amendment is, by the way, you all are home free, you do not want Republicans to be able to show the flag at their convention, you can do it, if you get the vote. I mean, no one is going to do that, at least I do not think anyone is going to do that. But I would think that may be one of the distinctions——

Mr. **Dellinger**. We would think no one is going to do that, but, you know, some of these statutes have 5-year terms of imprisonment and 5-year terms of imprisonment that covered conduct that was not burning, it was wearing, it was doing the same kind of conduct that some national leaders engage in, and that is wearing or giving a gift with the flag on it, based on very subtle distinctions, and that is, as the chairman noted, when those legislators knew they were pushing up against the first amendment, they knew the first amendment was out there.

The CHAIRMAN. Well, I again thank you all very, very much. You have rendered a service to us, helping us understand the issue better and I truly believe rendered a service to the country. We hope whatever we come up with, whether it is content-neutral or not, which I hope it is, I hope it is not wisdom-neutral.

I thank you all very, very much.

Mr. BALDWIN. Thank you very much, Senator.

Mr. DELLINGER. Senator, a visitor from England said that they would not have this problem even if they had a first amendment, because their symbol is not really the flag but the Queen and, of course, they said that we make it quite severe to burn the Queen, without a first amendment problem, so they do not have this issue.

The CHAIRMAN. But the fact is they have done that in the past, not always burn but eliminated other parts of the body.

At any rate, I wish I could talk to you about the Irish for a minute, but at any rate, thank you all very, very much.

I am going to call our next panel. We will have a brief 5-minute recess before we call up our next distinguished panel, Professor Hickok and Professor Presser. We will be right with you.

[Short recess.]

The CHAIRMAN. The committee will come to order.

My apologies, gentlemen. You have the committee's time and my time as long as you are willing to give yours. Again, I apologize for the attendance, but it is an unusual time here right now and there is about four major markups and conferences that are going on in the Armed Services Committee, I assume that is why the Senator cannot be here, to try to get something moving in a 3-week period, which usually takes a year, literally, one whole budget cycle to fund the President's drug proposal, so again, I sincerely apologize.

Let me begin and welcome you and, without taking any more of the committee's time or your time—I am told that at least one of you must leave by 5 p.m., if not both of you, but I want you to know I will stay as long as you are willing to stay, because I am very anxious to hear what you have to say.

Who among you must leave first, you, Professor Presser?

Mr. PRESSER. I guess I probably have to.

The CHAIRMAN. Do you mind, professor, if he goes first?

Mr. HICKOK. No, but I do not want to miss the questions, Senator, even if it means missing the plane, so it does not much matter to me.

The CHAIRMAN. Why don't you proceed anyway and we will hear both of your testimony and then I will proceed with the questions.

PANEL CONSISTING OF STEPHEN B. PRESSER, PROFESSOR OF LAW, NORTHWESTERN UNIVERSITY SCHOOL OF LAW; AND EUGENE W. HICKOK, JR., PROFESSOR OF POLITICAL SCIENCE, DICKINSON COLLEGE

Mr. **Presser**. I am grateful, Senator, for the opportunity to address the committee. Everything I want to say virtually is contained in the written testimony that you will enter into the record and I am not——

The **Chairman**. Yes, we will enter your entire testimony in the record.

Mr. **Presser**. I am not going to repeat that now. I will just take a few minutes to summarize that testimony and maybe quote a few of the stirring phrases from it and make one or two additional points.

I do appear in support of the proposed constitutional amendment. I think it is the best response to the Court's *Johnson* opinion. The basic point that I want to make in the written testimony and here is that it is not just the *Johnson* case that makes such an amendment a wise response. It is the strain of judicial thinking and legal and political philosophy that informs the *Johnson* case and that *Johnson* is the culmination of that really creates the need, partly as a result of Supreme Court jurisprudence, but primarily from other political, social and economic causes.

Over the years, we in America have seen an alarming decline in sources of traditional moral authority. We no longer can look to such traditional bases as the monarchy, the aristocracy, the church, or even the extended family, and without these bases of moral authority, we in America are in danger of losing sight of all the political, legal or constitutional values, save the maximization of individual expression or the gratification of individual desire.

In the beginning, however, 200 years ago, the Constitution's framers recognized that there was more to a republic and more to civil society than just the individual. Occasionally, but only very occasionally, we remember that an equally important value in our heritage is that there is a need to respect others, indeed that it is ultimately better to serve others in the community than to serve ourselves. It is this feeling, really, that Professor Dellinger and the other members of the first panel I think were trying to cast about for when they asked what is it really that the Federal Government is interested in protecting the flags or the uniforms of the armed services or other national symbols for.

We have virtually lost sight of this vital altruistic strain in our constitutional jurisprudence. Although the idea has recently emerged in such extraordinary political statements as President Bush's notion of a kinder, gentler nation, there is an ongoing examination of whether we should think more about altruism and less about individualism.

Now, believe it or not, I see the issue of whether we should affirm a national policy to respect the flag and what it stands for, particularly for what it stands for to the men and women who have fought and fallen for it, as a question of whether we will begin to allow this idea of altruism fully to return to constitutional law, where it was in the late 18th century, where it was throughout most of the 19th century, and where I think it still belongs.

I think such an affirmation is important, because I am fearful that we are, as a society, in danger of letting unbridled individual license run roughshod over everything else in our society.

Now, I am in favor of an amendment, but I see it really as more of an affirmation than as a major change in the Constitution, and I think that really Professor Dellinger and the others may have been right: It will not work a fundamental constitutional change, and I do not think that we need to fear wholesale destruction of the Bill of Rights from a 27th amendment or 27th amendment jurisprudence.

Well, the question that you asked, quite properly, is why not then a simple statute to affirm this constitutional principle, and in the ultimate answer as to whether or not I would support such a statute, I think I probably would, because it would be better than nothing, and I think that you have quite properly suggested from the Supreme Court's opinion that there is an opening for such a statute. But there is grave doubt, as former Judge Bork expressed to you in his testimony, about whether or not the Court would affirm such a statute. All the Court needs to do is open up the legislative history, and it does not take long to figure out that it is an attempt to overrule *Texas* v. *Johnson*.

There is an old, old maxim in the law, as you know, that you cannot do indirectly what you cannot do directly, and if I were a Supreme Court Justice, I would have great constitutional problems with the statute. Further, if it is really true that a statute could pass constitutional muster, if the Court would not throw it out——

The CHAIRMAN. Excuse me. Do you mind if I ask you a question while you are going along?

Mr. PRESSER. Not at all.

The CHAIRMAN. The last statement you made, you cannot do indirectly what you cannot do directly——

Mr. PRESSER. Yes.

The CHAIRMAN [continuing]. That is based on the assumption that what the Texas statute did was make all flag burning illegal, is that correct?

Mr. PRESSER. No, that is based on the assumption that what the Court established in *Texas* v. *Johnson* was that there is first amendment protection for acts of burning the flag to make a political statement.

The CHAIRMAN. OK. Is that where you and the panel before disagree? Because it seemed to me what they were saying, and what the Court was saying, is that you cannot pass a law in which a conviction rests upon whether or not you are casting contempt, not that you cannot pass a law that says you cannot burn the flag.

Mr. PRESSER. Well, I think the question of casting contempt and desecration is an important one, but it strikes me that what the Court was doing in *Johnson* was saying we believe that this is an action, an action designed to express a feeling about the flag that is protected by the first amendment, and that any attempt to overrule that decision interferes with that constitutional principle, that the Court finds existing in first amendment principle.

The CHAIRMAN. But you would have to accept that reading of the intention of the Court to arrive at the conclusion that you cannot do indirectly what you cannot do directly?

Mr. PRESSER. Yes. Yes, that is exactly right.

The CHAIRMAN. I just want to make sure I understand. I am not arguing about it. You may be right.

Mr. PRESSER. I would only add that if it is true that a statute could pass constitutional muster, a statute like the one you propose, what that then means, it seems to me, is that the purpose of the statute, to prevent the act that occurred in *Texas* v. *Johnson*, is a constitutional purpose and an amendment to clarify that would not actually work any change in the Constitution, and it is then difficult to understand why anybody would oppose such an amendment. It strikes me that it is the best way to clarify precisely what it is you intend to do.

The CHAIRMAN. That is helpful. Thank you. Keep going. Now I understand the point.

Mr. PRESSER. All right.

It strikes me that you use the amendment process not necessarily to make fundamental change, but to set the course of law back on the right track, and a number of members of the panel made that point. The 11th amendment, the 13th, the 14th, the 16th amendment all came in response to Supreme Court decisions. This proposed amendment, it seems to me, would set us back on the right track in an essential matter of constitutional law, the balance to be struck between the rights of the individual and the responsibilities to the society, the balance between liberty and license.

I just want to close with a few thoughts on what I have heard expressed as the opposition to the amendment, and this is a point that I think Professor Hickok is going to make as well.

The amendment does not—repeat, does not—seek to attack or destroy the Bill of Rights, and neither does your statute. It is not an attempt to change what the first amendment says. What it is an attempt to do is to remove a bit of a gloss that has been put on the first amendment, in fact, several glosses, really. One of those glosses is the idea that the Supreme Court's conception of particular parts of the first amendment can be applied against the States. That is now something that almost no one disputes, but it was something that came from the Court.

The second gloss is that symbolic actions are speech, all symbolic actions are speech and are deserving of first amendment protection. I think an amendment, and I think really your statute, too, would seek to remove that gloss but would not change the text of the first amendment and would not affect the first amendment's protection against speech. It may no longer be possible to commit outrageous acts of arson, but it would still be possible to commit whatever speech you want, you could still chant "We hate the red, white and blue, we spit on you," or whatever, you just could not burn the flag in the process.

I think a statute might or might not do the trick, but it strikes me as an issue important enough to treat by constitutional amendment. It is an issue that goes to the heart of what this country stands for and what millions of Americans gave their lives for. It has to for me, not just with arcane first amendment jurisprudence, but it has to do with basic questions of decency, civility, community, and a sense of what our shared understanding of the society is. It is about basic standards in the society.

Virtually everyone agrees that there is no constitutional basis for protection of thoroughly obscene materials. Perhaps it is time we recognize the feeling on the part of many of the American people, and perhaps enough to pass a constitutional amendment, that there is no constitutional basis for what we might call thoroughly obscene political actions. I think the desecration of the flag is such an action, and I think that the proposed amendment is probably the most effective way to deal with it.

[The statement of Mr. Presser follows:]

TESTIMONY OF STEPHEN B. PRESSER[1]
BEFORE THE SENATE JUDICIARY COMMITTEE
WITH REGARD TO APPROPRIATE STATUTORY AND CONSTITUTIONAL RESPONSES TO THE SUPREME COURT'S DECISION IN TEXAS v. JOHNSON

September 14, 1989

I am delighted and surprised to be plucked from the prairie, as it were, to appear, at the Committee's invitation, to testify on the measures that have been introduced in response to the Johnson decision. I teach courses in Corporations, Contracts, and American Legal History at Northwestern's Chicago campus, and courses in Constitutional and legal History and Business Law on its Evanston campus. I practiced law for three years, and I have been teaching for fifteen. I will testify, in support of the proposed Constitutional Amendment to enable Congres and the States to have "power to prohibit the physical descration of the Flag of the United States" from the perspective of a legal and constitutional historian, who spends most of his time teaching and studying about the world of the framers of the Constitution, the world of the late eighteenth century, a world with, I believe, many lessons still to teach us.

In the eighteenth century, when the roots of our republic were being laid down, when we declared independence from Great Britain, and later, when our Constitution was being framed, the nation was a very different place. Our population and political assumptions were much simpler than they are now, and many people were excluded from the political process. Women and blacks, for example, had no vote, and, in most jurisdictions, married women and both slave and free blacks had virtually no protection accorded to them by the legal system. Over the next two centuries the story of the development of American legal and Constitutional law has basically been the working out of the principles of democracy and enfranchisement, as slaves were freed, as women acquired rights to own property and make contracts, and as both groups eventually acquired the rights to vote and participate more fully in the society.

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[1] Professor of Law, Northwestern University School of Law, Chicago, Illinois.

In most of this two hundred year period the guiding principles of legal and constitutional development have had to do with an increasing recognition of Americans' liberties and rights. Particularly in the late nineteenth and twentieth centuries we have shaped most of our Constitutional and private law to accord with the notion that individuals ought to have a maximum of personal freedom. We have, probably following the work of English legal philosophers such as Jeremy Bentham and John Stuart Mill, taken the position that the more unfettered individuals are, the freer they are to develop their own styles of life and beliefs, the better off we will all be. We have taken Mill's "marketplace of ideas" as the touchstone, particularly in the late twentieth century, for First Amendment jurisprudence. The Johnson case represents something of a culmination of that trend, holding that the principle of individual freedom of expression is so important that the Constitution's First Amendment must be construed to prohibit a state from punishing an individual from expressing his thoughts by burning our nation's flag, even if such an individual knows that his action will confound and outrage his fellow citizens.

This philosophy centered around individual self-expression was not, I believe, the philosophy of most of the Constitution's framers, who were more concerned with the civic responsibilities and duties a citizen owed to the American republic than they were with assuring our citizens maximum freedom or license. In the late eighteenth century as well, concepts of honor, decency, and virtue loomed large, as service to others was recognized as a more important national philosophy than individual expression. Indeed, in the early years of our republic, and the First Amendment not withstanding, it was widely recognized that either at common law, or by federal statute, false writings critical of the character of the American government or its officials was a criminal offense punishable by fine or imprisonment. While our first Constitutional theorists recognized the value of a free press, and believed that there should be no prior restraints on publication, even when they considered the matter of political criticism, they believed that there were fundamental boundaries of truth and decency that should not be exceeded. Liberty was venerated, but license was feared. Indeed, it was commonly said that the two things a republic ought most to fear was too much luxury or too much licentiousness in the Press.

I do not advocate a return to the Alien and Sedition Acts and a renewal of the concept of Seditious Libel, but I think that we ought to recognize that the greatness of American institutions did not, in the late eighteenth century, and does not now stand or fall entirely on the principle of individual self-expression, or "self-actualization," as some of my liberal academic colleagues refer to it. For almost three hundred years, beginning in the seventeenth century there was a common religious and moral heritage that also bound Americans together, and until the twentieth century, for example, there were few who would have dissented from the notion that ours was a "Christian" nation, and that prayer in the public schools, and Christian prayer at that, was entirely appropriate. This is no longer the case, and the America of the late twentieth century is a much more ethnically, culturally, and religiously diverse place than our Framers probably envisioned.

With this increasing diversity, however, has come a recognition, by our courts and legislatures, that much of our religious and moral tradition cannot be accorded a special place in our public life, because too many Americans, and too much that is vital in America, now comes from different traditions and cultures. So it is that school prayer now finds itself prohibited by a construction of the First Amendment to the Constitution, and so it is that it is a sorely vexed point in Constitutional law whether a municipality may display a creche, a Menorah, or other religious symbols on public property during the holiday season.

As we have become a more polyglot society and as our common religious and cultural heritage has diminished, the Constitution itself, the purported individualistic political traditions of our framers, and the American political process have taken on some of the characteristics of a national religion and culture. For many years, even though our citizens came from diverse backgrounds, cultures, and traditions, we could all pledge allegiance to a common flag, venerate a common symbol, and thus, in spite of our very real differences, feel and behave in a manner that suggested that we were part of a common undertaking, a common experiment in liberty and justice for all. Such a feeling and such belief, of course, led even a great civil libertarian justice such as the late Felix Frankfurter to express his belief, in dissent, in the

Barnette case[2], that it was perfectly appropriate for a state to compel all of its public school children, even those with religious objections, to pledge allegiance to the flag, as an activity in pursuit of a worthy civic goal. The view of the majority in Barnette, however, and the view of the majority in Johnson, seems to be that it is Constitutionally inappropriate ever to compel an unwilling citizen to engage in symbolic patriotic behavior, and that such patriotism is better taught by example and persuasion than compulsion.

I am too much of a twentieth century liberal myself not to see some wisdom in this position, and perhaps it is even now clearly dictated by many of the Supreme Court's First Amendment decisions, but I think that its application in Johnson goes too far, and that the President's proposed Constitutional Amendment is the only appropriate and necessary corrective. What the logic of the majority in Johnson misses, what our Constitution's framers, and what some other great English classic liberals, such as Edmund Burke, knew, is that there are times when the sensibilities, the traditions, the prudence, and even what Burke called the "prejudices" (by which he probably meant something like what we would call concepts of decency or taste) deserve some deference. Now that our more secularized society forbids the official expression of this sensibility, tradition, or taste through religious exercises, virtually the only acceptable public outlet seems to be in the realm of politics or patriotism.

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[2] West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), relied on by the majority in the Johnson case.

The Constitution has come to be a combination secular Torah, Talmud, and New Testament, and the flag is the symbol of this development. The dissenters in the Johnson case, Justices Rehnquist, White, O'Connor, and Stevens, understood this. They would have construed the court's prior First Amendment cases to permit banning desecration of the flag, because of the offense suffered by many citizens whose sincere feelings of pride, patriotism, and tradition are now expressed in this unique national secular sacred symbol.

A nation and a people, as our framers knew, need a sense of community and tradition as much as they need the freedom for individual self-expression. A sense of appropriate conduct, of morals, of respect, and of decency is an inevitable concomitant of what it means to be a community. Some sorts of conduct must, of necessity, be prohibited to members of the community as fundamentally inconsistent with what the community stands for. All communities, for example, bar murder and theft as fundamentally inconsistent with any form of civilized life.

Communities with a strong religious tradition bar blasphemy as well, and there was a time when this was the law in America. The most challenging task for the American nation, as it proceeds in the third century of its development, is to strike a balance between the need to protect the freedom of American individuals and the need to maintain the sense of an American community.

Without freedom for individuals much that is rich and diverse in American culture would vanish, but without an American sense of community and decency unbridled American individualism will degenerate into American license, anarchy, and greed. We have gone too far down this road already, in my opinion, and much of American life might be improved by a stronger shared sense of what obligations to others, what honor, and what decency require. The First Amendment's freedom of expression has never been construed to protect such moral outrages as child pornography, nor has the First Amendment been construed to bar individual actions of libel or slander when one's reputation has been wrongly tarnished. These restraints on freedom of expression flow from the community's sense of what is tolerable, what is moral, and what is decent.

Just as I believe that it is wrong to construe freedom of expression so broadly that obscenity or libel must be left uncontrolled, so do I believe that the outrage sought by maliciously burning the flag can and ought to be prohibited. It may well be true, as the Supreme Court has often reminded us, that it is a test of our commitment to individual freedom to be able to tolerate the statement of the thought or the idea that we hate, but there is nothing in such a theory that requires us to tolerate actions that offend our sense of decency, such as obscenity or flag burning. It is clear that the Constitution protects freedom of expression, but I think it is probably wrong to believe that it protects intentionally outrageous acts of arson. As the minority in Johnson understood, the Texas flag desecration statute did not prohibit, nor would the proposed Constitutional Amendment prohibit, the communication of thoughts or ideas regarding the flag or any other political notion. It is only offensive actions that would be barred.

Even though my sympathies lie with the dissenters in Johnson, I believe, as Justice Kennedy made plain in his clearly agonized concurring opinion in Johnson, that the logic of the Court's previous First Amendment cases compelled the result the majority reached. Since this logic is now the Constitutional rule in the area, I do not see how a Congressional statute, even one as carefully and neutrally crafted as that Senator Biden has proposed, could pass Constitutional muster, if one was inclined, as the majority in Johnson was, to view the act of flag-burning as symbolic protected speech. There is nothing that I might say on this point that is not fully articulated in the testimony you received on August 1, 1989 from former Judge Bork. Only a new Supreme Court decision or a Constitutional Amendment could change the result in Johnson, and, as a good judicial conservative, I have some trouble advocating an abrupt about-face for the court.

Even if those like Professor Tribe, who think that such a statute as Senator Biden's could pass First Amendment tests, are correct, for the reasons I have set forth, having to do with American values of community, responsibility, decency, and honor, I think that it is appropriate that a Constitutional Amendment, such as that Senator Dole has introduced into the Senate, be passed to reverse Johnson. Unlike Profesor Tribe, I do not see such an Amendment as "designed to override" or to "deface" even a part of the Bill of Rights. It is not the Bill of Rights, but the judicial gloss that the Supreme Court has put on it that is at issue here, and it is a double gloss in this case, once when the constraints of the First Amendment were held, though the Amendment in question was silent on the point, to have been extended to the states through the Fourteenth Amendment, and second when the First Amendment was held to apply to protect acts of conduct as well as acts of speech.

For more than a generation, through such judicial glosses, much of the jurisprudence of the Supreme Court has been devoted to the furthering of the values of American individualism, and perhaps much of this has been to good, noble, and lasting effect. I think that now is the time, however, to permit the American people themselves to make a statement about the American political community and the responsibility membership in that community entails. A Constitutional Amendment such as the one the President proposes and Senator Dole has introduced as a Joint Resolution of the Senate would make such a statement, and, if my views on the strength of the tradition of American morality, decency, and obligation are correct, I think the American people deserve the chance to make such a statement.

As we have experienced the turmoil of the Great Depression, and as we have moved on from the carnage of the Second World War, in the past fifty years, with the increasing pace of immigration and technological advances, we have seen an extraordinary breakup of many of the shared ideals on which this country was built. I have suggested that there is a certain logic in our First Amendment jurisprudence, but the public's grasp of the Supreme Court's logic of individualism, at least in Chicago, where I live, has led to some rather strange and dispiriting results.

In our effort to allow for cultural diversity, we have accepted the notion that a single person may disrupt the lives of the entire community in order to express himself and we have called this freedom of speech. I need look no further than Skokie, Illinois, a predominately Jewish suburb outside Chicago, where Skokie's residents--many of whom survived the Holocaust--were forced to allow members of the American Nazi party, men who venerated those who sought to exterminate the Jews, to march through Skokie streets. Paradoxically, there is a feeling among many members of the public and among some politicians that the icons of a minority's culture may not be trampled upon by any individual. Recently in Chicago a student artist painted the black former Mayor Harold Washington in bra and panties and had his painting, physically removed from an exhibit and injured by City aldermen, one of whom maintained that the veneration of Harold Washington was more important than the First Amendment.

In the war of ideas we are now often at war with ourselves--black against white, Jew against Gentile, immigrant against native. Perhaps we have reached a juncture where the nation is not as much a melting pot as a boiling cauldron. We often seem unable to agree on the simplest norms for behavior, and we no longer seem to agree on the most basic ideas that bind us. If this trend continues we will, in reality, be a nation or a people no more.

We cannot hope for a preacher who will walk through our cities and towns telling allegorical tales which will make clear the original guiding principles of the Constitution. All we have are symbols--the flag being the most recognizable of these, the flag being the one we all seem to endorse. Not every citizen has memorized the Bill of Rights, or can adequately express the rationale behind the Constitution's Separation of Powers, or explain recent Supreme Court decisions concerning Procedural Due Process. But in the first one hundred and fifty years of our country's history, our citizens--whether recent arrivals passing through Ellis Island, or Boston Brahmins descended from Mayflower pilgrims--recognized several symbols of our country's ethos. The Statue of Liberty. The tattered page of the Declaration of Independence. The picture of Washington crossing the Potomac. And, above all, as Chief Justice Rehnquist's dissenting opinion in Johnson made clear, the flag. Just as the New Testament's Jesus gave his followers simple parables to make easily understandable the powerful ideas with which he hoped to bind a church, our nation's framers gave us some of these select symbols to make our country understandable and immediate to all.

I have outlined for you the reasons why, as a legal historian, as a law teacher, and as a Chicagoan, I believe a Constitutional Amendment in the service of veneration of a cherished national symbol is desirable, but perhaps I should close by making clearer the reasons for my belief that we would be justified in punishing those who seek to desecrate it. My sentiments in this regard do flow from a nostalgia for what the President might call a "kinder, gentler America," a place where common decency resulted in an ethic of shared obligation. Prior to the many tumultuous, and heart-rending events of the past few decades, nearly all Americans viewed their citizenship as a mixture of rights and responsibilities. The right to vote carried with it a corresponding responsibility to engage in jury duty or other public service. The right to protection from the nation's enemies carried with it the corresponding responsibility to lay down one's life, if necessary, in war.

But now we seem to view our citizenship through the glass darkly. We see our rights--to fair or equal treatment, to government aid, to protection. But many of us cannot see our responsibilities. A new Constitutional statement of responsibility to the flag, if nothing else, would be a good beginning to bring us back into the light.

The **Chairman**. Thank you.

If you do not mind, Professor, can I follow up now on a few of these points? If the amendment is not designed and not intended, and would not have the effect of, rewriting the first amendment or amending the first amendment, then does not the last panel's collective point that they made hold, that the way the amendment is written, it would have no effect on the *Johnson* case?

Mr. **Presser**. I do not think so at all, Senator. Just as if the Supreme Court were to review your statute and look at the legislative history and decide it was designed to reverse *Texas* v. *Johnson*, anybody reading the legislative history of the amendment, what we are saying right now, what atmosphere the amendment was produced in, has to read that amendment as an attempt to reverse *Texas* v. *Johnson*.

The **Chairman**. OK. Take me back to law school now, because I need often to go back. When interpreting the meaning of a constitutional amendment, what rules of construction does the Court use——

Mr. **Presser**. That is a wonderful question, Senator.

The **Chairman** [continuing]. Relative to legislative history?

Mr. **Presser**. There are several different canons of interpretation that the courts use from time to time. Indeed, in the 19th century, the position was very strong that you use no legislative history, you go only with the plain meaning of the words in the document. That has undergone some change, and now I think there is a fairly general recognition that you look at the legislative history.

But the key here is how you interpret the word "desecration," what you do with that particular word that is used in the statute, and I do not think you can make sense out of that word without looking to the context in which the amendment is proposed, without looking to the *Texas* v. *Johnson* case, without looking to the fact that the amendment is produced in response to that decision.

The **Chairman**. That is an interesting—I do not mean interesting as frivolous—that is an interesting way to deal with the argument that concerns me, one of the things that concerns me most about this amendment, and that is what "desecration" means. I mean, you have to consecrate something before you can desecrate it. I do not know——

Mr. **Presser**. All we know for sure is that it means what happened in *Texas* v. *Johnson*.

The **Chairman**. Well, you assume that will be the decision arrived at by the Court, because you acknowledge, because we do not know what it means, the Court will have to go back to the legislative history to determine what it means, at a minimum it will mean, what happened in *Johnson* is the case.

Mr. **Presser**. That is right. There is room for interpretation, just as there is in any constitutional provision, but the Court—and depending on whether it is a Court that believes in strict construction or loose construction—is going to look at all the available data in interpreting it. I am not——

The **Chairman**. Would you be happier with and feel more secure with—secure in the sense of arriving at the conclusion that you would like to arrive at, which is the same one I would like to arrive at—would you be happier with a differently worded amendment?

Now, you argued this amendment passes muster, in light of the point we just—I will not go back over the point, but it is not an unfair—the question I am asking is not for the purpose for you to cast aspersions on this amendment, but one of the things we have to figure out is, from my standpoint, if we are going to end up with an amendment, I want the best one we can end up with, that is going to work.

Mr. PRESSER. You ask a very fair, very difficult question. In particular, one of the panelists whom you just heard from suggested that the amendment ought to say the first amendment shall not be interpreted to forbid States from passing legislation regarding desecration of the flag. That is one way of clarifying it, but I do not happen to like that, because then it begins to look more like an attack on the first amendment and I do not think that is what the amendment is.

My answer to the question, would I like a differently worded amendment, is probably no. I like the concept of this amendment. I do not think there is really that much doubt about what——

The CHAIRMAN. Why would not my statute in the form of an amendment be better than the present amendment, because at least what I do or attempt to do is specifically define what we wish to prohibit? Would not those definitions meet the basic underlying rationale for the need to have an amendment or a statute or something work, that is, we are restoring a sense of—what is the word you used?

Mr. PRESSER. Civility, decency.

The CHAIRMAN. Civility and decency.

Mr. PRESSER. Respect for the community. Maybe it would but, you know, the trouble that I have with that is the wonderful hypothetical you posed to the last panel about the veteran who offers up his flag in happy sacrifice to the gods. That would be a clear violation of your constitutional amendment or statute, but not necessarily desecrating the flag, and that is why I like the "desecration."

The CHAIRMAN. You see, what worries me about "desecration" is it leaves so much to the discretion of a local or national prosecutorial or judicial body, that which they wish to punish and which they do not wish to punish, and it seems to me it is so susceptible to the whims of the moment.

I cannot imagine, for example, most State legislatures today saying that if someone offered an amendment to the statute being required, the enabling legislation—to use the term we use—the Constitution just enables States to pass legislation. I cannot imagine in my State, if I introduced an amendment in the State legislature while that was being debated, saying, "And furthermore, the Socialist Party cannot use the American flag, or the Communist Party cannot use the American flag as their symbol." I cannot imagine that not passing. I cannot imagine it not passing, if I said, "The Aryan Nation cannot use the American flag as their symbol." I cannot imagine that not passing.

Mr. PRESSER. Then the Court will have to decide whether that is desecration or not, if the amendment in its present form passes.

The CHAIRMAN. Well, is not "desecration" defined by whatever the State legislature says "desecration" is?

Mr. PRESSER. No, I think it is defined by the interpretation of the Constitution that the Supreme Court wishes to make. I mean, that is the way you handle constitutional questions.

The CHAIRMAN. I see. OK. So, what we are really doing is we are yielding to nine women and men total carte blanche in determining what they think desecration is.

Mr. PRESSER. Not necessarily. The ultimate decision on what it means probably has to be made by the Supreme Court, but you are quite correct, the States make that initial decision and the Court has to decide whether it is going to examine the issue. But I should——

The CHAIRMAN. Does that not mean we are going to have thousands or hundreds of pieces of——

Mr. PRESSER. Can I address that issue directly, because it is——

The CHAIRMAN. I appreciate your indulgence, professor. I do not want him to miss his plane and I do want to give him a chance to tell me what——

Mr. PRESSER. Sure. I am going to finish with this fairly fast. The issue that you raise is a real one, the question of will there be hundreds or thousands of people prosecuted in a different manner, will there be 50 different statutes, will there be thousands of different prosecutorial strategies, is a real one. But if what it is that we are dealing with here is a question of community standards and is a question of approaches to responsibilities and not rights, it may well be that the Federal system suggests that you have different treatment of the issue, at least initially, and if it ever reaches the Court you resolve it.

The CHAIRMAN. You know, it is amazing how those of us who think we understand where we fall philosophically in our English jurisprudential tradition, where we fall on that spectrum that underlies that or the American political tradition—however you want to define that. We find ourselves so many times at odds with ourselves.

This administration has spent 7 years—and I say this because the President was Vice President at the time—in the last administration, to be more precise, trying to and fundamentally taking issue with the notion that, in the area of pornography, community standards should be the measure. They set up a Commission on Pornography, they made the argument—that is, the political center right in the country—saying that the Court's notion of community standards on pornography is not acceptable, that we should have one national standard, because what is pornography is pornography is pornography and you should not be able to go look at smut in New York City, in Times Square, and not look at smut in Oshkosh, you know, and so on. They argued that because we are such a nation that is so mobile that we are exposing our children to this and the fact that it was—you know, and so on and so forth.

Now, here we are having to make the exact opposite argument to justify this constitutional amendment, which only goes to show that I am not the only one that finds myself at cross-purposes with myself sometimes. You cannot comment, but is it not interesting philosophically, we think that we are—you know, we find ourselves, those of us who say we are not states righters arguing States rights on things where it suits us, and those of us who are "federalists" arguing, you know, States rights positions where it does not suit us. I guess maybe they are not at odds.

Do you have time? I understand, if you have to leave, please, at any time during this, but, Professor, if we could hear your testimony and then, if you have time, Professor Presser—again, I understand if you cannot—would you be willing to answer some questions in writing that I have prepared that we are not going to have time to get to? I am not going to give a lot of homework here, but——

Mr. PRESSER. Yes.

The CHAIRMAN. OK.

Welcome and thank you for being so gracious.

STATEMENT OF EUGENE W. HICKOK, JR., PROFESSOR OF POLITICAL SCIENCE, DICKINSON COLLEGE

Mr. HICKOK. I have to say at the outset that I approach these questions with a different kind of perspective. I am not a lawyer, I am a student of politics and political science, although I do teach at a law school, and most of my work has been on the history of this institution and how it approaches constitutional questions, whether Members of Congress have ever—and I think they have—taken it upon themselves to try to find out what the Constitution means or whether they have always done, what seems to be the case these days, accept the assumption that the Constitution is what the Supreme Court says it is.

The discussions that have gone on today and the earlier discussions about this topic, the future of the physical integrity of the flag, are discussions about what the Constitution means, what the first amendment means, and how best to proceed.

In my opinion, those citizens who are interested in overturning the Court's opinion in the *Johnson* case and restoring protections against the desecration of the American flag should seek to amend the Constitution.

I am not persuaded, so far anyway, that the legislation that has been introduced in the Senate nor the legislation that passed in the House two days ago can be squared with the Court's decision in *Johnson*. Moreover, I question whether the legislation would provide an appropriate response to the *Johnson* decision, even if it could be square with the case.

As I understand it—and I think that the points of the first panel spoke to these points—I will go through them quickly—as I understand it——

The CHAIRMAN. Take your time. You have waited a long time.

Mr. HICKOK. That is all right, I have learned a lot—is to propose a neutral flag desecration law that punishes any violation of the physical integrity of the flag. As I understand it, it would ban destruction of the flag in all circumstances, regardless of the point of view being expressed, as the hope of the way to get around the decision in *Texas* v. *Johnson*.

My first problem with that approach is it is overbroad, in accordance with that discussion. My question becomes is it true that we really seek to protect the physical integrity of the American flag, regardless of the circumstances in which that integrity might be under attack.

You mentioned earlier an example, an instance in which we might think it is perfectly appropriate to burn the flag, and you talked about the veteran. One can think of the example from the Boys Scouts, where it says in the manual the proper way to dispose of a flag that is in poor shape, is to burn it and bury it.

My point is quite simple and is a point that has been raised by others. We can think of appropriate circumstances, reasons, contexts in which burning the flag is appropriate. There is nothing inherently evil about burning the American flag.

It seems to me that it is the context or the reason and maybe, in the words of the Court, the message being conveyed by the act of burning the flag that really does bother the individuals in Congress and across this country who were bothered by the Supreme Court opinion.

Now, the legislation passed by the House speaks to that point and it makes an exception. It talks about the appropriate way to dispose of a worn-out American flag. As currently worded, as I understand it, the proposal before the Senate does not make that exception yet. Whatever the case, the only way to protect certain kinds of conduct, as the House version points out, is to make explicit exceptions to the general rule outlawing desecration of the flag. However, by making such explicit exceptions, Congress emphasizes for the Supreme Court to see, quite obviously, that what it really cares about is not burning the flag, but why the flag is being burned. It takes away the neutrality that seems to be at the heart of the issue. In other words, Congress exposes that its true intent is to limit flag burning for certain reasons, and that is precisely what the Court spoke to in the *Johnson* case.

The proposed legislation also attempts to correct what I think is rightly considered to be a wrong-headed understanding by the Court when the proposal tries to get rid of the distinction between public and private desecration. We also spoke about this earlier this afternoon.

The position embraced by the proposed legislation seems to be that the Court's decision pertains to public acts, public desecration of the flag. This being the case, by expunging the reference to public, we might hope to remove any possible inference that desecration may be related to freedom of expression. But I have to wonder, why would anyone burn a flag in private and, of course, if they did burn a flag in private, under the proposed legislation, they are breaking the law.

It seems to me that the flag is a symbol, it takes on meaning, therefore, as all symbols do, because it conveys a message. Destroying the flag only takes on meaning because it sends a message. It only means something when it is observed. Because of this and due to the Supreme Court's constitutional, I would say, contrivance at times of symbolic speech, the way they currently understand the first amendment, it seems almost inevitable, almost inevitable that flag burning will be tied to the first amendment, given the way the Court understands the first amendment today. Because of all this, in my opinion, those seeking to protect the flag should pursue a different approach and that is a constitutional amendment.

Now, the amendment offered by the President is an appropriate first step, but it seems to me—and I would agree with Professor Dellinger earlier and I guess somewhat disagree with you here—it provides Congress and the States with the power to enact laws aimed at protecting the flag. However, the exercise of that power under the proposed amendment would be subject, in my opinion, to other provisions of the Constitution, much the way the exercise of the commerce power by Congress is subject to the provisions of the Constitution.

In other words, amending the Constitution with the language suggested by the administration would do nothing, I am afraid, to alter the constitutional landscape carved out by the Court in *Johnson*. When writing legislation under the authority, the amendment, the Congress would still have to consider the first amendment and the Court's understanding of how that amendment might limit its ability to protect the flag.

There is one way I think to remedy that problem. It is a rather straightforward wording of the amendment, and that would say something like this, perhaps:

> The First Amendment to the Constitution shall not be construed as to limit the power of Congress and the States to prohibit the physical desecration of the flag of the United States.

That wording has been discussed by other members of other panels; it seems to me that is a straightforward, certainly controversial way to state what the intent of the Congress and the President is regarding this issue.

Obviously, amending the Constitution is a very serious and a very difficult procedure. I do feel, however, that enough public sentiment for such an amendment exists in this country at this time, and it is appropriate for Congress to propose an amendment and for the people of this great Republic to have the opportunity to debate the wisdom of constitutional change.

Let me close by saying that I think the primary problem with the statutory approach embraced by the House and by several Members of the Senate is that it represents more of a response to public opinion over the *Johnson* case, rather than a seasoned analysis and an interpretation of the Constitution and the first amendment.

It seems to me that the legislation is an attempt to—and understandably so—get around the latest offering by the Supreme Court. In many ways, it is an attempt to finesse a difficult and very politically charged issue.

History teaches us and the framers of the Constitution informed us that Members of Congress possess the authority and have the responsibility to interpret on their own the meaning of the Constitution. Any proposal emanating from Congress dealing with an issue related to constitutional interpretation should be the product of the prudent deliberation of the House and the Senate and eschew what may be politically popular or convenient for the moment. For these reasons, it is particularly difficult for Members of Congress to engage in constitutional deliberation. That is precisely why it is very important that they do.

A close reading of the Court's decision in *Johnson* and of the Constitution apart from that decision, combined with a due regard for the authority of public opinion and the responsibility of Congress to, as James Madison once put it, refine and enlarge public opinion, leads me to conclude that the only way to ensure *Johnson* is overturned, if that is the goal of this body, the only way to ensure *Johnson* is overturned is to amend the Constitution.

[The statement of Mr. Hickok follows:]

TESTIMONY OF EUGENE W. HICKOK, JR

BEFORE THE JUDICIARY COMMITTEE OF THE U.S. SENATE

SEPTEMBER 14, 1989

Thank you Mr. Chairman.

I am grateful for the opportunity to appear before this Committee today to discuss the Supreme Court's decision in _Texas v. Johnson_, and how the Congress might appropriately respond to that decision.

More than two hundred years ago this Sunday, September 17, the delegates to the Constitutional Convention in Philadelphia adjourned after having signed a new Constitution. Within days the document was published in every one of the ninety-nine newspapers that existed in the states at that time. Within months, the document was being debated in each of the states. In 1789, the First Congress convened to discuss and debate the meaning of that document even more.

I mention all of this to emphasize that discussions such as the one we are having today -- discussions about the meaning of the Constitution -- are quite appropriately conducted in the halls of Congress. We live in a day and age in which, for many Americans, the Constitution is what the justices say it is. But history instructs us that that is a bit misleading. The Supreme Court does indeed have the final say -- it is the final arbiter of constitutional questions. But the members of the Congress and the President have also taken oaths to support and defend and the President have also taken oaths to support and defend the Constitution and have a responsibility to seek for themselves to determine what that document means.

Abraham Lincoln knew this when, in 1858, he asserted that the Supreme Court's opinion in Dred Scott, reached only to the litigants before the Court. Lincoln refused to endorse the decision as a "political rule" and argued that the Court did not possess all authority when determining constitutional questions. As Lincoln said in his inaugural address three years later: if government policy on "vital questions affecting the whole people is to be irrevocably fixed" by the Court, "the people will have ceased to be their own rulers."

More recently, Associate Justice Anthony Kennedy, during his confirmation hearings before this committee, when asked by Senator Specter whether the Supreme Court was the "final decision-maker of what the Constitution means" responded that Congress has as much of a responsibility to debate and interpret the Constitution as the Court. Indeed, according to Justice Kennedy, the members of the Senate and House have an obligation to speak out when they feel the Court is wrong, and a responsibility to seek to overturn the Court's decision when they feel the decision is wrong.

Today, as the Senate Judiciary Committee continues its deliberations concerning the issues raised in Texas v. Johnson, the tradition of congressional inquiry into the meaning of the Constitution continues, and I find that to be both politically and historically significant, important and appropriate.

In Texas v. Johnson, the Court effectively overturned the flag desecration statutes in forty-eight states, as well as the Federal Flag Desecration Statute which prohibits knowingly and publicly "cast[ing] contempt upon any flag of the United States" by burning or otherwise physically mistreating it. In the opinion of the Court, such statutes represent unconstitutional infringements upon the freedom of speech (or expression) protected by the First Amendment of the Constitution.

The Court's opinion in Johnson is troubling for a number of reasons. At the most basic level, most citizens find the argument that flag burning is protected symbolic speech to be specious. Certainly Mr. Johnson did not have to burn a flag to make his point. As Chief Justice Rehnquist argues in his dissent, denying Mr. Johnson the "right" to burn the flag would not have been tantamount to limiting his freedom of speech.

The Court's opinion is troubling as well because it contributes to the constitutionally suspect doctrine of "symbolic speech" that has been foisted upon the Constitution and the American people by an over-imaginative judiciary. After Johnson, one is left wondering what isn't symbolic speech; what sorts of conduct aren't protected for the sake of getting the message across.

And the Johnson case is troubling because the Court ignores the proposition -- once deeply embedded in custom, law, and politics in this country -- that there are certain fundamental values and symbols that provide the cement that helps to hold a political community together, and that when those values or symbols are violated the community itself is violated.

It should be remembered, on the other hand, that the Court did not recognize a "constitutional right to burn the American flag." It did say, however, that in those circumstances when flag burning "communicates some message" it is related to freedom of expression and therefore protected under the First Amendment.

The reaction of the American people to the Johnson decision has been overwhelmingly negative. In the Congress, members have energetically and eloquently expressed their opposition to the Court's reading of the Constitution and offered legislation designed to protect the flag by molding federal law in recognition of the Johnson decision. On Tuesday, September 12, the House of Representatives passed the Flag Protection Act of 1989. President Bush has called for an amendment to the Constitution to overturn the Court's opinion in Johnson.

In the Senate, the primary statutory proposal has been introduced by Senator Biden and is very similar to the legislation passed recently in the House of Representatives. Senator Biden's proposal states:

> Whoever knowingly mutilates, defaces, burns,

> maintains on the floor or ground, or tramples upon any flag of the United States shall be fined not more than $1000 or imprisoned for not more than one year, or both.

The constitutional amendment proposed by President Bush states

> The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States.

In my opinion, those citizens interested in overturning the Court's opinion in Johnson and restoring protection against the desecration of the American flag should seek to amend the Constitution. I am not persuaded that the legislation introduced by Senator Biden, nor the legislation that passed recently in the House, can be squared with the Court's decision in Johnson. Moreover, I question whether the legislation would provide an appropriate response to the Johnson decision, even if it could be squared with the Court's opinion in that case.

The purpose of the proposed statute is to establish a "neutral" flag desecration law that punishes any violation of the physical integrity of the flag. The Senator would "ban destruction of the flag in all circumstances regardless of the point of view being expressed."

My problem with this response is that it is over broad. Is it true that we seek to protect the physical integrity of the American flag regardless of the circumstances surrounding the prohibited conduct? One can think of several instances in which burning the American flag might be entirely appropriate conduct: Boy Scouts, for example, are instructed to burn the flag and bury it when it is worn beyond repair. It might be appropriate to honor the request of a veteran who wishes, upon his death, to be cremated with the American flag clutched to his breast. There is nothing inherently evil, in other words, in burning an American flag. It is the context or reason -- that "message being conveyed" -- by the act of burning the American flag that really matters.

The legislation passed by the House contains provisions that speak to this issue. As currently worded, the Senator's proposed legislation would require us to be blind to such exceptions in the name of neutrality regarding flag burning.

The only way to protect certain kinds of conduct, which society might deem appropriate, regarding the physical destruction of the flag, is to make explicit exceptions to the general rule outlawing desecration of the flag. The House of Representatives has done this. However, by making such exceptions, Congress merely emphasizes (for the Supreme Court to see) that what it really cares about is not burning the flag, per se, but why the flag is being burned. In other words, Congress exposes that its true intent is to limit flag burning for certain reasons, and that is precisely what the Court spoke to in the Johnson case.

The problem with a "neutral" stat [illegible] that is would prohibit conduct which no one wants to prohibit and do little to stop conduct that few people would permit. For there are many ways to cast contempt upon the flag.

The proposed legislation also attempts to correct what I think is rightly considered to be a wrong-headed understanding of the Constitution and the First Amendment on the part of the Court by obliterating the distinction between public and private desecration of the flag. The Senator's position seems to be that the Court's decision pertains to public desecration of the flag -- only when desecration takes place in public is freedom of expression an issue. This being the case, by expunging the reference to public desecration, the Senator hopes to remove any possible inference that desecration may be related to freedom of expression. One has to wonder, however, why anyone would burn a flag in private. Of course, under the proposed legislation that would be illegal and a punishable offense. But why do it?

The flag is a symbol. It takes on meaning because of the message it conveys. Destroying the flag only takes on meaning because it sends a message; it only means something when it is observed. Because of this,-- and due to the Supreme Court's constitutional contrivance of "symbolic speech" -- the First Amendment, at least in the opinion of the Court, is inevitably tied to flag burning.

In my opinion, those seeking to protect the flag should pursue a more responsible and appropriate response to the Court's opinion in Johnson--and a response which I feel would overturn the Court's position in that case-- and propose an amendment to the Constitution to empower Congress to make illegal what the Court has proclaimed to be constitutionally protected.

An amendment similar to the one offered by President Bush is an appropriate first step in that direction. However, as it currently stands, the proposed amendment would not provide Congress with any more authority to protect the flag than it has at this moment.

As the proposed amendment is worded, it provides Congress and the states with power to enact laws aimed at protecting the flag. However, the exercise of that power would be subject to other provisions of the Constitution; much the way the exercise of the commerce power by Congress is subject to other provisions of the Constitution. In other words, amending the Constitution, with the language suggested by the President, would do nothing to alter the constitutional landscape carved out by the Court in Johnson. When writing legislation under the authority of the proposed amendment, the Congress would still have to consider the First Amendment and the Court's understanding of how that amendment might limit the Congress's ability to protect the flag.

The only way to remedy this is to attach to the proposed amendment a provision which will exempt Congress and the states from any First Amendment restrictions on the exercise of this power. As an example, I would propose the following:

> The First Amendment to this Constitution shall not be construed as to limit the power of the Congress and the states to prohibit the physical desecration of the flag of the United States.

Obviously, amending the Constitution is a serious and difficult procedure. I do feel, however, that enough public sentiment for such an amendment exists in this country at this time that it is entirely appropriate for Congress to propose such an amendment and for the people of this great Republic to have the opportunity to debate the wisdom of Constitutional change.

The primary problem with the statutory approach embraced by the House of Representatives and proposed by several members of the Senate, is that it represents more of a response to public opinion over the Johnson case than a reasoned analysis and interpretation of the Constitution and the First Amendment. The proposed legislation is an attempt to get around the latest offering by the Supreme Court. It is an attempt to finesse a difficult and politically charged issue.

History teaches us, and the framers of the Constitution informed us, that members of Congress possess the authority and have the responsibility to interpret on their own the meaning of the Constitution. Any proposal emanating from Congress dealing with an issue related to constitutional interpretation should be the product of the prudent deliberation of the House and the

Senate and eschew what may be politically popular or convenient at the moment. For these reasons it is particularly difficult for members of Congress to engage in constitutional deliberation. But that is also why it is particularly important that they do.

A close reading of the Court's decision in Johnson and of the Constitution, combined with a due regard for the authority of public opinion and the responsibility of Congress to, as James Madison once put it "refine and enlarge" that opinion, leads me to conclude that the only way to ensure Johnson is overturned is to amend the Constitution. Proposing an amendment, such as the one I have outlined here, would demonstrate that the members of this institution take seriously James Madison's assertion that Congress has "as good a right as any branch of the government to declare its sense of the meaning of the Constitution." It would reflect what John Breckenridge asserted in 1802, that "those who make the laws are presumed to have an equal attachment to and interest in the Constitution; are equally bound by oath to support it and have an equal right to give a construction to it."

As this debate continues we should all be reminded that it is the Constitution, so justly dear to us all and not merely the opinions of the members of the Court that we must look to as a guide to direct us in the carrying out of our responsibilities.

The CHAIRMAN. Thank you for a thoughtful statement.

Let me do to you what, of necessity, the press has to do to me or anyone else who holds public office, and that is attempt to synthesize or reduce a very thoughtful 6-, 8-, 10-page statement to a 30-second——

Mr. HICKOK. Sound bite.

The CHAIRMAN [continuing]. Sound bite, and that is if I had that job, if I had the job of doing that for the nightly news on your testimony, I would say the following:

Neither the President nor the Congress have engaged in a seasoned analysis of the constitutional implications of the *Johnson* decision, and both are attempting to finesse the issue, Congress through a statute and the administration through refusing to acknowledge that their intent is to expressly amend the first amendment.

Would that be a fair statement?

Mr. HICKOK. In my opinion, I think that is a pretty accurate statement.

Mr. PRESSER. Can I participate in this?

The CHAIRMAN. I am not saying it is right or wrong, I just want to make sure I understand it, because——

Mr. PRESSER. I did not think you were saying that at all, because I——

The CHAIRMAN. Don't change his mind now.

Mr. HICKOK. Now, wait a second, let me——

The CHAIRMAN. I may get a job with NBC, if this goes on.

Mr. HICKOK. Let me say why I said it. I think that you have to put all your cards on the table.

The CHAIRMAN. Yes.

Mr. HICKOK. If you feel that the *Johnson* case is bad constitutional law, because of the notion of symbolic speech and flag desecration, and just because of the way you interpret what the Constitution and the first amendment means, as well as what the Court says in *Johnson,* it seems to me you should be straightforward in your response to it, as opposed to try to find ways to get around having to say what you really think.

The CHAIRMAN. Now, Professor Presser, why do you think folks do not want to just come out and say——

Mr. PRESSER. Because the sound bite is not—the President has been evading the issue, the Congress has been evading the issue, let's face it, what we are trying to do is amend the first amendment, because that is not what the amendment does, it does not—repeat, does not amend the first amendment, it removes a judicial gloss that the Supreme Court has put on it, and suggests that a particular interpretation of that amendment is wrong.

The CHAIRMAN. At a minimum, what it does is it attempts to change what is now the present reading of the first amendment.

Mr. PRESSER. It is quite correct to say that what it does is change the constitutional law of the Republic, there is no doubt about that. And the point that Professor Hickok makes I think so well is that what you have got here is an issue of constitutional law and a constitutional principle, the way you ought to address it is at the constitutional level, rather than the statutory level.

The CHAIRMAN. I am not suggesting you are not saying that. I wanted to make sure that—I am a little confused as to why the administration just does not flat-out say——

Mr. HICKOK. Well, let me respond to that, if I may, not for the administration but my sense of the nature of the debate in this town on this issue. I think Members of Congress and members of this and previous administrations have a very difficult time, as most students of the Constitution and constitutional law do today, distinguishing between the words of the first amendment and the latest rendering of those words by the Supreme Court.

It seems to me that it is quite possible for the Members of Congress to reach a different sense of what the first amendment means regarding this issue and to propose an amendment to the Constitution, or if they could come up with a statute, that expresses that.

The CHAIRMAN. That gets into a phenomenal semantic argument. We could have a ball here, because, you know, there have been volumes written, not all of which I have read, I acknowledge, that revolve around the argument of whether or not Jerome Frank was right or Roscoe Pound was right or Karl Llewelyn was right about what the Constitution is—is the Constitution what the Court says it is, is the Constitution in and of itself what it says on its face, who interprets what its face says—I mean, we get into all of that and the bottom line is that we would be taking an established constitutional principle relating to the first amendment and changing it, rejecting it.

Mr. PRESSER. Well, we are taking a particular set of facts as interpreted in the *Texas* v. *Johnson* case and mandating that that interpretation be reversed. As former Judge Bork raised in his testimony, the principle at issue may not be a firmly established constitutional principle at all, just a result of——

The CHAIRMAN. In fairness—I should not be facetious—he does not think there are any firmly established principles, unless you really go back a long way.

Mr. PRESSER. Can I just make one more—it is hard for a law professor not to want to make one more comment.

The CHAIRMAN. No, please do. That is why we have you here.

Mr. PRESSER. You raise the issue of why doesn't the President come clean and say what it is that he is up to or why didn't the Assistant Attorney General or whoever testified before you make clear what it was that they were doing, and it strikes me, as a legal historian and someone who studies the evolution of constitutional law, that part of what is happening here is an almost inarticulate response to an issue. It is almost, to use the analogy that you did a few minutes ago, it is almost like pornography and obscenity, you know there is something wrong and you know you have got to do something about it and you have not quite thought through the exact implications of what it is that you are doing.

Professor Hickok is right, that in the amendment process you think that through and you give the reasons and you try to come up with the best way of doing what it is you want to do, but the process has to start somewhere.

The CHAIRMAN. Professor, you also argue, though, that they thought it through but came to the wrong conclusion, don't you, regarding how to do it?

Mr. HICKOK. Yes, I am persuaded with the argument that you have to be a little more explicit about how this relates to the first amendment.

The CHAIRMAN. Let me speak to the question of—I am moving off of an attempt to examine the legal grounds and basis upon which either attempt is appropriate or not appropriate, back to a more basic question of why, other than for the purpose of expressing a political sentiment, would someone destroy, burn, mutilate a flag. And in the circumstance where they had no such purpose, other than one of reverence, expressing their reverence for the flag and what it stood for, burning it—which there is a way in which tattered old flags are burned, Boys Scouts burn them, and so on—I am struck by the way I have observed, me reacting over the years and individuals I know reacting to the flag.

If you notice, almost no matter where you are, when you were a Boys Scout, notwithstanding the fact that Johnny Mulberry, who was carrying the flag on his back because he is only 5 feet 3 inches and his job is to hoist it on the pole and it is dragging on the ground and he does not mean it to be dragging on the ground—what is the first thing you did when you were a kid? You ran to pick up the end of the flag, so it would not be on the ground.

If any one of us walked out of here, the three of us, walked out of here and there was a trashcan outside here and a fire in it and you saw a flag half in and half out of the can, what do you think your reaction would be? Wouldn't your first instinct be to pull that flag out and stamp out the fire? There is no one around, someone just threw it out in the trash. Wouldn't it be or would it? I am asking an honest question.

I am trying to get at what I think—I may be wrong and maybe my approach on the statute is wrong, but I really think there is something more than symbolic speech that is associated with our reaction to the destruction of the flag. I argue from experience, my own experience, which may be unique, and my own feeling that the flag in and of itself is viewed by Americans as worthy of protection. And it seems to me if you reach that conclusion—and I may be wrong about that—then you have begun to make the case that it does not have to relate to the symbolic message. It is a symbol, but the fact that a message is attempting to be communicated or not communicated by its destruction is not the real reason why Americans want to protect it.

They want to protect it because it is the flag, period, and not unlike they would want to protect something of value, and the message that is attached to why it is being destroyed is not very relevant to most Americans. The first instinct any American would have, it seems to me, when they walk around the corner and see a flag burning, is to grab a fire extinguisher to put it out.

Mr. HICKOK. If I may, I agree completely and——

The CHAIRMAN. I am not sure it makes the point that I am——

Mr. HICKOK. I think that is why most Americans were bothered by the opinion of the Court, because it seemed to be—they were with the symbolic freedom of speech argument, they seemed to be arguing contrary to what you just said. I think most Americans do feel there is something there that is precious, that it is not just a symbol in the empty sense, but it stands for all those things that are very important as Americans, including freedom of speech.

The CHAIRMAN. And the rationale——

Mr. HICKOK. But the Court did not, you see, and that is the problem and that is why I think the Court——

The CHAIRMAN. I understand what the Court did not say. The question is what we do to impact upon what the Court did and did not say, and I get—when the examples of destroying a flag in the proper military procedure or the Boys Scouts manual, the basic premise upon which the manual is based is that that which they are destroying is no longer a flag. That is the basic premise upon which the rationale rests for the means by which you dispose of what is left of a flag.

So, it seems to me a bit of a red herring to talk about, being worried about the exception being made, for if a veteran, with all the pomp and circumstance associated with the destruction of a flag walked in here and pulled that flag off that stanchion and, under pure military procedure, burned it, they would be in deep trouble, because it is still a flag.

Now, as you can tell, I miss my philosophy courses more than my law school courses, but if—I should drop this, because it could go on longer than maybe it is fruitful, but let me make one other point and ask a question. I will make a statement and ask you to respond, Professor Presser, and I guess I should not keep trespassing on either of your time beyond this.

The question was implicitly asked, if not expressly asked, by one or both of you and many others over the period of these hearings, and that is why would we punish by an overly broad statute an action relative to the flag that really was not on its face offensive. I mean, we really did not care to punish, we were not out to try to deal with it.

And my answer to that is, I think it is a small price to pay to be overly broad versus running the risk of being overly broad in providing an exception, another exception—there are exceptions, many—an overly broad exception to the first amendment, which, even if I agree with you, Professor Presser, that that is what the amendment should do, the way it is written, it seems to me, it gives such broad license that, at a minimum, the damage done to the country, the body politic as a whole by an overly broad exception to the first amendment versus the damage done to the country as a whole to an overly broad statute that prevents what otherwise would be an acceptable destruction of a flag, is a very easy tradeoff for me to make. How do you respond to that, other than saying I have been here too long?

Mr. PRESSER. No, you raise a thoughtful and difficult point, but reflecting on what you said during the few minutes before that, when you were really asking yourself, well, why is it I really want to make sure that we have a statute that prevents destruction of the flag, what is there about the flag that is special—in everything you said, you seem to suggest that it was the veneration of the flag that was at issue and that forms of destruction of the flag that somehow do not interfere with that veneration, when a flag is no longer a flag, to use the philosophical question you just raised, when you inadvertently destroy the flag, somehow setting it on fire because someone pushes you over when you have a match or something, or dozens of other reasons that you probably should never really be punished for—when you raise that issue, what you are really doing is suggesting that, even if your statute were drafted the way it is now, in a way it would not much matter, from the language in the constitutional amendment as it is submitted.

What we are really trying to determine are what instances of flag burnings do we punish or not. If you have an overbroad statute, you have a risk of too many prosecutions that some court may finally say, look, this was not what it was intended for, and then you are right back with the same difficulty of interpretation as you would be with the word "desecration." It strikes me, though, that that word "desecration" captures the sentiment that you expressed, and that is why I like the word in the amendment.

The **Chairman**. If I could say that is what "desecration" meant in the amendment——

Mr. **Presser**. Well, that is what we are here for.

The **Chairman**. That is true, so that is one of the things I am looking at here, and I say to the minority staff that is here to communicate to their bosses, and that is if I cannot do it by statute, I want to do it but I want to make sure I get it done, and it really disturbs me, this notion of not knowing what desecration—desecration being so broad and so susceptible to litigation, that we may end up with the circumstance that drags on and on and on and on and does not resolve anything, and I just really am—I am not being facetious when I say this—when it comes to the Constitution, I am extremely concerned about fooling about it. It has worked pretty well for a long time.

Having said that, let me close with this last very, very brief question and it will require I think only a brief answer. Assume for the sake of discussion that my statute or some variation of it becomes the law and is signed into law by the President, "the law of the land" until the Supreme Court decides whether it is the law of the land.

What have we lost, because, obviously, any burning of the flag is able to be prosecuted under that and any conviction upon that is able to send someone to jail until the Supreme Court has in fact ruled that it is unconstitutional. So, we are not allowing what is the circumstance now, where there is no law out there, arguably, and we would, at a minimum, have no less and, on all probability, further elucidation on the Court's point of view on this issue, based on their ruling on that question, and we would have all the ability to move—in fact, being a student of this body and the Congress, you would know it would increase geometrically the prospects that an amendment would pass and pass quickly through this body as well as the States.

So, why not, if I can play off the maxim that you cannot do indirectly what you are prohibited from doing directly, it seems to me the general rule of the Constitution is you should not do by way of the Constitution what you might be able to do by way of statute, and why not try the first route first, since there is no loss in terms of the prospect of people actually out there burning the flag without fear of some retribution?

Mr. **Presser**. Well, the short answer to that might be that, if what you really want to do is get at the issue in the *Texas* v. *Johnson* case, maybe you want to draft a statute more explicitly trying to do that, than a statute as broad as the one you draft.

The point that Professor Hickok raised before, you do not seem to be exactly responding to the constitutional issue. Now, if you are right, that what this will do is, in fact, create a response to the constitutional issue and much faster, then I think it is a pretty good idea to try it. But if, as might happen, it will deflect attention from the constitutional issue and cause people to think, well, we have solved this difficult problem by a statute that does not really address the difficult constitutional question, I think you might not have done a service.

The **Chairman**. If the end result is people are not burning flags or, if they are, they are going to jail, theoretically it could be we still have not solved the constitutional question.

Mr. **Presser**. Right.

The **Chairman**. Thank you so much for saying that. I am not being smart. I for the first time understand now the position and the point that has repeatedly been made to me by intelligent men like yourself over the last month. I mean that sincerely. I understand.

You see, all I am trying to do is deal with the first piece, not solve the broader, larger, more significant constitutional question that you argue persuasively needs resolution.

Mr. **Presser**. That is why we are here.

The **Chairman**. I'll be darned. I am glad the light finally went on for me.

Would you like to say anything, Professor Hickok?

Mr. **Hickok**. I dare not.

The **Chairman**. You have probably trained 60 percent of the Delaware lawyers. Every Delaware lawyer has either gone to Dickinson Law School, Harvard, or Georgetown, except those of us who went to Syracuse.

Is there anything either of you would like to make in a closing statement? We got you 3 minutes of your time, Professor. Thanks a lot. I am not being smart, I really mean it, thank you so much for your testimony. It was worth my waiting for, from both of you. Thanks an awful lot.

The hearing is adjourned.

[Off the record.]

The **Chairman**. Back on the record.

I ask unanimous consent and, since I am the only one here, it is certain to be granted, there are several questions from different colleagues, including myself, we would like to submit to you, as well as statements. The record will remain open for another 24 hours for any of my colleagues who wish to make any statements regarding today's hearing.

[The statements and material referred to follows:]

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TO: Senate Committee on the Judiciary
FAX (202) 224-9516

FROM: Gordon B. Baldwin, Professor of Law, University of Wisconsin; and Brady Williamson, Attorney, Madison, Wisconsin.

The following responses are prepared to answer questions possed in Senator Biden's letter to use dated September 15, 1989.

Answers to Senate questions

Questions posed by Senator Thurmond

1. We don't read Texas v Johnson as not allowing the national government from enacting a content-neutral law to forbid flag desecration. Statutory exceptions, to allow for a respectful destruction of a worn flag, might not be necessary, but would be advisable as a clarification.

2. omitted

3. The Establishment Clause of the First Amendment is construed as an explicit invitation for the courts to search the record for a legislative purpose to establish a religion. Indeed the Court is quite aggressive in that search as Justice Scalia complained in Edwards v. Aguilar. The speech clause, however, is construed to allow neutral time, place and manner restrictions, and the Supreme Court has not searched for a forbidden purpose where the law is clear on its face. The different approach is attributable to the text of the First Amendment.

Questions posed by Senator Grassley:

Supreme Court decisions in civil liberties matters seldom inspire "joy." Often the defendants, or even plaintiffs in these decisions have done unpleasant things, or are over zealous. But the Constitution is construed to protect speech we hate, as Justice Holmes observed. The Texas flag statute was unartful and a majority of the Court focused on its defect - it was framed in terms of actions "offensive" to a viewer. So, while it was the kind of speech we hate, it was also the kind of speech statute that threatens First Amendment values.

Because Texas v. Johnson rested on the defects of a particular state statute, it is appropriate for a legislature to repair that defect and enact a new statute without the flaws found offensive by the Supreme Court.

Yes, government can, within limits, forbid obscenity over licensed media. The Court so held in FCC v. Pacifica Corp. Noise regulations which do not depend on the contents of a

2

message the noise conveys are also allowed. We could not, of course, allow the noise of a political speech, but forbid the noise of a concert, or vice versa.

Indecent public behavior is just that - it is not the words which are punishable, but it is the behavior. Johnson, for example, might have been prosecuted for starting a fire in a public place.

We believe signs of a society's civilization are found in the symbols it venerates, in the music which it applauds, and in the art which it preserves. A flag, as well as a monument may be among those symbols. Another sign of civilization, however, is tolerance of dissenters, and a willingness to allow them a voice.

The logical extension of Texas v. Johnson goes no further requiring government to tolerate speech that offends with few exceptions. That is speech which is found, obscene, which produces imminent and likely violence, or which is an immediate and serious threat to national security can be penalized.

We don't believe a constitutional amendment is necessary. But an amendment could say that "Congress and the states may, consistent with the First Amendment, make laws to forbid flag desecration."

Mr. Warner's testimony rests on an uncommon degree of tolerance and understanding of others. Many lack his forbearance, hence a flag desecration law may be useful in mobilizing public authority to make it less likely that people will be provoked into violence against a flag burner.

Questions posed by Senator Hatch

1. We are opposed to a constitutional amendment that explicitly states its purpose to displace "any other provision of this Constitution." This might well allow dispensing with rights to counsel, trials by juries, the privilege against self-incrimination etc.

2. A national statute protecting the national symbol has the advantage of creating a uniform law. Uniform laws are commonplace, although most have been adopted by the states independently. We see a possibility that courts might construe a national flag statute as preempting dissimilar state laws on the same subject.

3. We don't see any immediate "problem" created by differing state laws on flag desecration because prosecutions are rare. But differing state laws on a subject of national importance sometimes create confusion. The symbol ought to be honored through uniform rules.

4. No

3

5. Many states have laws that are similar to the one struck down in Texas v. Johnson, and redrafting will be necessary. A constitutional amendment might, or might not, revive existing, and otherwise unconstitutional, state flag laws. Much depends on how the constitutional amendment is construed. Moreover the laws of some states might not provide for automatic revival of a previously invalid statute. Why not act now with a federal statute that passes the test of Texas v. Johnson?

6. Differing state laws, patchworks if you will, are acceptable, and sometimes desirable, in our federal system. But the trend toward more uniform, or at least more similar, criminal laws has been underway for a generation. The Model Penal Code pointed a way for many states to follow. Many states readily adopt proposals for uniform state laws.

7. Different results in different states may, or may not, be acceptable. We think, however, that when a national symbol is to be protected it is desirable as a matter of national policy that we follow uniform rules to honor it. We are, after all, a nation.

8. The same answer to this question as in question 7.

9. If the Congress makes it plain in the statute itself that its commands are content neutral that ought to be enough. The normal rule is not to look behind a clear statutory direction. Congress surely has power to enact laws protecting a national symbol. Enacting a law to protect a symbol is not to be equated to a law forbidding speech. But if Congress passed a law forbidding criticizing the flag, or the national anthem, that law would flunk the First Amendment because it was not content neutral.

Thurmond

QUESTIONS FOR SECOND PANEL

1. If the statute is passed and *later amended* to allow some types of flag destruction while prohibiting others, isn't this what the Supreme Court said was unconstitutional in the *Johnson* decision as contrary to the First Amendment? Please explain.

2. Obviously, proponents of either the statutory approach or a Constitutional amendment seek to protect the integrity of the flag as the symbol of our Nation. In light of the *Johnson* decision, do you feel the Supreme Court would rule that the statute is indeed neutral in its application and therefore Constitutional? Please explain.

3. The clarity of the effectiveness of a Constitutional amendment versus a statute is readily apparent. Do you feel that this proposed Constitutional amendment which limits activity, earlier interpreted as protected under the First Amendment, would be inconsistent with the amendment process as provided in the Constitution? Please explain.

QUESTIONS SUBMITTED BY SENATOR CHARLES E. GRASSLEY
FOR PROFESSORS BALDWIN - DELLINGER - & WILLIAMSON
SEPTEMBER 14, 1989

....

LET ME ASK THE QUESTION THAT MR. GIERKE OF THE AMERICAN LEGION ASKED IN HIS TESTIMONY BEFORE THE COMMITTEE ON SEPTEMBER 13, 1989:

*** WHY - DESPITE ALL THE TALK ABOUT IT BEING A VICTORY FOR THE CONSTITUTION AND THE PROTECTION OF FREE SPEECH - DO WE FEEL NO JOY OVER THE SUPREME COURT'S JOHNSON DECISION ?

*** WHY IS THERE NO JOY EXPRESSED BY THOSE WHO BELIEVE THAT THE SUPREME COURT'S DECISION PROMOTES FREE SPEECH ?

*** IF THERE IS SATISFACTION THAT THE JOHNSON DECISION IS A CELEBRATION OF FREE SPEECH, THEN WHY WOULD IT BE NECESSARY TO ENACT A STATUTE, SIMILAR TO S. 1338, IN RESPONSE TO THAT DECISION ?

SOME PROPONENTS OF A CONSTITUTIONAL AMENDMENT TO PROTECT THE FLAG HAVE TESTIFIED THAT A STATUTE CANNOT BE ENACTED TO CIRCUMVENT OR OVERTURN A SUPREME COURT DECISION THAT BASED UPON CONSTITUTIONAL REASONING, AND NOT STATUTORY INTERPRETATION.

*** WHAT IS YOUR OPINION OF THIS VIEW OF A STATUTORY CURE TO THE JOHNSON FLAG BURNING DECISION ?

WE ALL AGREE, I THINK, THAT THE FIRST AMENDMENT IS NOT ABSOLUTE. IT DOES NOT PROTECT OBSCENITY, LIBEL, 'FIGHTING WORDS', OR STATEMENTS THAT --BY GIVING AID AND COMFORT TO AN ENEMY -- ARE TREASONOUS.

*** YOU WOULD AGREE, I HOPE, THAT THE GOVERNMENT CAN CONSTITUTIONALLY PUNISH ACTIONS SUCH AS:

(A) DELIVERING A POLITICAL MESSAGE OVER TELEVISION IN OBSCENITIES -

(B) OR EXPRESSING A POLITICAL VIEWPOINT FROM A SOUND TRUCK AT TWO-O'CLOCK IN THE MORNING IN A RESIDENTIAL NEIGHBORHOOD -

(C) OR MAKING A POINT BY ENGAGING IN INDECENT PUBLIC BEHAVIOR ?

*** DOES A CIVILIZED SOCIETY -- BASED UPON CONSISTENT CONDUCT OVER A LONG PERIOD OF TIME -- HAVE THE RIGHT TO DECLARE THAT CERTAIN OBJECTS AND SYMBOLS OCCUPY SUCH A VENERATED STATUS IN THAT SOCIETY THAT THEIR PHYSICAL INTEGRITY CAN BE PROTECTED ?

*** AND DOESN'T THE SUPREME COURT NEED TO TAKE THIS CONSISTENT CONDUCT INTO CONSIDERATION, RATHER THAN THEIR OWN MORAL, POLITICAL AND AESTHETIC PREFERENCES IN MAKING SUCH DETERMINATIONS ?

*** WHAT IS THE LOGICAL EXTENSION OF THE RATIONALE OF THE JOHNSON CASE - PUBLIC NUDITY ? SEXUAL ACTS DONE IN PUBLIC ? AS LONG AS THESE ACTIONS ARE ACCOMPANIED BY SOME MESSAGE OR PROTEST AGAINST SOCIETY'S MORALS ?

** IS THERE ANY LANGUAGE THAT YOU COULD RECOMMEND TO THE COMMITTEE -- IN THE FORM OF A PROPOSED CONSTITUTIONAL AMENDMENT -- THAT WOULD REMEDY THE JOHNSON DECISION ?

ON SEPTEMBER 13, 1989, MR. JAMES WARNER, AN ATTORNEY HERE IN WASHINGTON, TESTIFIED AGAINST AMENDING THE CONSTITUTION TO PROTECT THE FLAG.

HIS TESTIMONY WAS VERY MOVING - TO SAY THE LEAST - AS HE DESCRIBED THE PHYSICAL AND MENTAL TORTURE HE ENDURED FOR FIVE-AND-ONE-HALF YEARS AS A PRISONER OF WAR IN NORTH VIET NAM.

MR. WARNER TOLD US THAT WE DO NOT NEED TO AMEND THE CONSTITUTION IN ORDER TO PUNISH THOSE WHO BURN THE FLAG. HE SAID THEY BURN THE FLAG BECAUSE THEY HATE AMERICA AND THEY ARE AFRAID OF FREEDOM.

*** WHAT IS YOUR REACTION TO HIS QUESTION: "WHAT BETTER WAY TO HURT THEM THAN WITH THE SUBVERSIVE IDEA OF FREEDOM" BY ALLOWING PROTESTORS TO BURN THE FLAG ?

THURMOND

QUESTIONS FOR FIRST PANEL

1. If the statutory approach were to pass and subsequent exceptions to its prohibition of flag desecration were to be enacted, do you believe that this could be viewed as fostering one particular view of the flag and contrary to the Johnson decision?

2. In Wallace v. Jaffree, the Supreme Court struck down the Alabama moment of silence despite Alabama's assertion that the statute was based on a secular purpose. The Court looked behind the statute and ruled that the Alabama legislature had passed the statute for religious purposes.

Now, in Professor Dellinger's testimony, he states that Senator Biden's proposed statute on flag desecration is "not necessarily related to the suppression of expression", which I assume means that it would be neutral in its application. My question is, could the statute survive the Supreme Court's scrutiny if they look behind the actual language of the statute as they did in the Jaffree decision? Please explain.

Thurmond

QUESTIONS FOR SECOND PANEL

1. If the statute is passed and later amended to allow some types of flag destruction while prohibiting others, isn't this what the Supreme Court said was unconstitutional in the *Johnson* decision as contrary to the First Amendment? Please explain.

2. Obviously, proponents of either the statutory approach or a Constitutional amendment seek to protect the integrity of the flag as the symbol of our Nation. In light of the *Johnson* decision, do you feel the Supreme Court would rule that the statute is indeed neutral in its application and therefore Constitutional? Please explain.

3. The clarity of the effectiveness of a Constitutional amendment versus a statute is readily apparent. Do you feel that this proposed Constitutional amendment which limits activity, earlier interpreted as protected under the First Amendment, would be inconsistent with the amendment process as provided in the Constitution? Please explain.

QUESTIONS OF SENATOR ORRIN G. HATCH
FOR PROFESSOR WALTER DELLINGER

1. Your written statement and testimony strongly criticizes the Administration's proposed constitutional amendment, asserting that it would not accomplish its purpose. Have you examined S.J.Res. 169, an alternative proposal for a constitutional amendment, which provides the following:

> "SECTION 1. The Congress shall have the power to prohibit public conduct which knowingly casts contempt upon the flag of the United States, notwithstanding any other provision of this Constitution.
>
> "SECTION 2. No provision of this Constitution shall be construed as limiting the power of the States to prohibit public conduct which knowingly casts contempt upon the flag of the United States."

Does your objection as to the efficacy of the Administration's amendment to accomplish its purpose apply with equal strength to this proposed amendment?

2. Your written statement and testimony both claim that, "No amendment has ever been proposed by Congress that would alter in any way" the First Amendment to the Constitution. How is it, then, that the language of that amendment, providing that "Congress shall make no law . . . abridging the freedom of speech" has been employed by the Supreme Court to hold unconstitutional a statute adopted not by Congress but by the Texas state legislature? That took another amendment to the Constitution -- the Fourteenth -- didn't it? Thus is it not accurate to say that the Fourteenth Amendment has in fact altered the First Amendment?

QUESTIONS FROM SENATOR THURMOND TO PROFESSOR EUGENE HICKOK

1. If the statute is passed and later amended to allow some types of flag destruction while prohibiting others, isn't this what the Supreme Court said was unconstitutional in the Johnson decision as contrary to the First Amendment? Please explain.

In my opinion, the virtue of a "neutral" statute such as the one proposed by Senator Biden is that it is indeed neutral -- blind to the circumstances surrounding flag destruction. The problem with such a statute, of course, is that there is nothing inherently evil with flag burning. One can think of several circumstances in which burning the American flag might be appropriate. Amending the "neutral" legislation to allow the destruction of the flag under certain conditions (to allow for the proper disposal of a worn out flag, for example) serves to emphasize that members of Congress recognize that there are certain appropriate reasons for flag burning, as well as inappropriate reasons. In other words, the amended legislation merely points out for the Supreme Court to see that Congress cares about the reasons, motivations, and "massage being conveyed" by flag burning, and that is exactly what the Court ruled on in Johnson.

2. Obviously, proponents of either the statutory approach or a Constitutional amendment seek to protect the integrity of the flag as the symbol of our Nation. In light of the Johnson decision, do you feel the Supreme Court would rule that the statute is indeed neutral in its application and therefore Constitutional? Please explain.

I think there is a good chance the Court would find the "neutral" statute constitutional. But as I mentioned in my testimony before the Committee and in my response to question #1, I question the wisdom of a "neutral" statute. In addition, I think the "neutral" statute might run into some problems because it is vague and overbroad.

3. The clarity of the effectiveness of a Constitutional amendment versus a statute is readily apparent. Do you feel that the proposed Constitutional amendment which limits activity, earlier interpreted as protected under the First Amendment, would be inconsistent with the amendment process as provided in the Constitution? Please explain.

There is nothing inconsistent with the amendment process provided by the Constitution in proposing an amendment to empower Congress and the States to enact legislation aimed at protecting the physical integrity of the American flag. I do feel the Administration's proposed amendment needs to be rewritten so that it speaks directly to the Court's decision in Johnson. In other words, the amendment should say that the First Amendment does not preclude Congress or the States from writing legislation to protect the flag.

Responses of Professor Presser to "Questions for Second Panel"
FROM SENATOR THURMOND

1. If the statute is passed and later amended to allow some types of flag destruction while prohibiting others, isn't this what the Supreme Court said was unconstitutional in the Johnson decision as contrary to the First Amendment? Please explain.

As I explained in my earlier testimony, I think that any statute that the Congress might pass a result of these hearings would be unconstitutional, for the reasons made clear in the testimony of former Judge Bork. Briefly, once the purpose of the Congress, brought out in the hearings -- to change the result in the *Texas* v. *Johnson* case -- is evident, a reviewing court ought to find any statute unconstitutional, since it is an attempt to overrule the Supreme Court's construction of the Constitution by statute, a task of which Congress is not capable. Only a constitutional amendment or a reversal by a majority of the Supreme Court could change the *Johnson* result.

In addition, the majority opinion by Justice Brennan did have some dicta which suggested that *Johnson* might have turned out differently if the Texas statute in question had as its purpose only protecting the physical integrity of the flag (so that the Court *did* hint that it might find Constitutional a statute such as the one Senator Biden has proposed). This might indeed have meant that while a Congressional statute that prohibited all types of flag destruction might have been found constitutional, since it would have only protected the physical integrity of the flag. If such a statute were amended only to prohibit some types of destruction, however, it could not then be said that it protected only the physical integrity of the flag, and thus it would have to be found unconstitutional. In any event, in my opinion, this language was only dicta, it would not be binding in a future opinion, and, once these hearings have been held, the nature of any Constitutional review would have to change to take into account the purpose behind the Congressional statute. At that point, as I said in my prior testimony, the core legal maxim that prohibits anyone from doing indirectly what is not permissible directly would come into play, and any statute would fail to pass constitutional tests.

2. Obviously, proponents of either the statutory approach or a Constitutional amendment seek to protect the integrity of the flag as the symbol of our nation. In light of the Johnson decision, do you feel that the Supreme Court would rule that the statute is indeed neutral in its application and therefore Constitutional? Please explain.

I would answer this question in the same manner I answered Question 1, above. Once the Johnson case has established that burning the flag can be a form of Constitutionally-protected speech, and rejected Texas's argument that protecting the symbolic nature of the national flag was a "compelling state purpose," I fail to see how any Congressional statute could reverse the result. I do not believe that any statute could be construed as "neutral," in light of these hearings, and I think the Court would have to hold that the statute was a blatant attempt to challenge the Court's interpretation of the Constitution, and was thus unconstitutional.

3. The clarity of the effectiveness of a Constitutional amendment versus a statute is readily apparent. Do you feel that this proposed Constitutional amendment which limits activity, earlier interpreted as protected under the First Amendment, would be inconsistent with the amendment process as provided in the Constitution? Please explain.

In my opinion the amendment process exists, among other reasons, for the people to declare that they wish their Constitution to be interpreted in a particular manner. Four other Amendments, as you heard in testimony before the Committee, came about as a result of Supreme Court decisions which were sought to be reversed. The effect of those Amendments, then, was to indicate how the people thought the Constitution should be interpreted. Indeed, I would say that this was also the purpose of the Bill of Rights itself, the First ten amendments to the Constitution, which were passed to clarify the nature of our Federal government. I think that the proposed Amendment to the Constitution, to allow statutes prohibiting desecration of the flag, fits firmly within that tradition. It should never be forgotten that the Constitution survives because it has the support of the people, who understand that they are the nation's ultimate sovereign.

Any amendment does no more than confirm that sovereignty. Thomas Jefferson once wrote that a little revolution every twenty years was necessary because, as he put it, the "tree of liberty" needed to be watered from time to time "with the blood of patriots." I think that Jefferson probably went a bit too far, but I do think that an Amendment to the Constitution, from time to time, does help in reaffirming the basic principle that our people are still the Republic's sovereign. When the Supreme Court has reached a point in Constitutional interpretation where they have strayed far from the meaning of the First Amendment, as I think they did in Johnson, such an Amendment would not only restate the principle of popular sovereignty, but would put First Amendment jurisprudence back on track.

The **Chairman**. Again, fellows, thanks a lot and this time we really are adjourned. Thanks.

[Whereupon, at 5:02 p.m., the committee was adjourned.]

ADDITIONAL SUBMISSIONS FOR THE RECORD

CHAIRMAN HOUSE OF DELEGATES
George E. Bushnell, Jr.
150 West Jefferson
Suite 2500
Detroit, MI 48226

ABA
AMERICAN BAR ASSOCIATION
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

August 21, 1989

Dear Senator:

I write to advise you that at its recent meeting in Honolulu, the American Bar Association's House of Delegates, "in the interest of preserving intact the right to freedom of speech and expression under the First Amendment," overwhelmingly adopted a resolution opposing any amendment to the U.S. Constitution or enactment of federal legislation concerning desecration of the American flag. The resolution further "deplores any desecration of the flag and declares its full support for the proposition that the flag is a revered national symbol that ought to be treated with great respect by all citizens of the United States of America."

The House of Delegates adopted its policy based on the unanimous report of a special task force I had appointed to examine the numerous proposals stemming from the Supreme Court decision in Texas v. Johnson and to recommend ABA policy positions on these proposals. The task force was chaired by former Commissioner of the Internal Revenue Service Randolph Thrower. Its members were Columbia University Law School Dean Barbara Black; former Deputy Secretary of State Warren Christopher; former Harvard Law School Dean and Solicitor General of the United States Erwin Griswold; Stanford University Law School Professor Gerald Gunther; former New York University Law School Dean Robert McKay; former U.S. Attorney Earl Silbert; and former Secretary of State Cyrus Vance.

Since you will soon be asked to vote on these proposals I am sending along to you both the adopted resolution and the report of the task force which I trust that you and your staff will find helpful.

We of the American Bar would be pleased to provide you with any additional information you might require, or to meet with you at your convenience so that we can respond to any concerns that you might have.

Should you have any questions please contact Robert Evans, Director of our Governmental Affairs Office in Washington, D.C., at 331-2214.

Sincerely,

George E. Bushnell, J.

George E. Bushnell, Jr.
Chairman, House of Delegates

Adopted by voice vote
August 1989

Report No. 401

The proposal was amended to read as follows:

Be it resolved, that the American Bar Association, in the interest of preserving intact the right to freedom of speech and expression under the First Amendment of the United States Constitution, opposes the adoption of an amendment to the Constitution concerning the desecration of the American flag.

Be it further resolved, that the American Bar Association opposes the enactment of federal legislation that would seek to criminalize the desecration of the American flag as a political protest.

Be it further resolved, that the American Bar Association deplores any desecration of the flag and declares its full support for the proposition that the flag is a revered national symbol that ought to be treated with great respect by all citizens of the United States of America.

REPORT

INTRODUCTION

On September 25, 1789, the newly-created House of Representatives of the United States Congress, pursuant to a pledge made to the States in order to secure their adoption of the Constitution, launched the 'Bill of Rights', the first ten amendments to the Constitution. Prominently placed in the first of the adopted amendments was the guarantee of freedom of speech. Its application was broadened and deepened by the adoption of the 14th Amendment following the close of the Civil War. Over almost 200 years, many of which were stressful for the growing nation and its people, the Bill of Rights has remained honored and intact.

In response to the decision of the United States Supreme Court in Texas v. Johnson, ___ U.S. ___, 57 U.S.L.W. 4770 (June 21, 1989), it is now being proposed for the first time that the First Amendment's guarantee of freedom of speech be restricted by constitutional amendment. The lawyers of America have an appreciation of the significance of the principle of freedom of speech and how it is woven into the fabric of our nation. Hence, they understand that the American flag and what it stands for is not honored or protected by criminalizing the offensive acts of those who express their opposition to governmental policies by abusing the flag.

Lawyers, as a profession, also have a special obligation to defend the Constitution and its cardinal principles. Because it appears that Congress may act quickly on a constitutional amendment or Federal legislation, or both, the Task Force believes that the American Bar Association should voice its strong opposition in order that its views may be considered before Congress acts.

THE DECISION IN TEXAS V. JOHNSON

It is essential in considering the proposed resolution that one have a clear understanding of what the Supreme Court held in Texas v. Johnson. It should also be noted that the Court affirmed an en banc decision of the Texas Court of Criminal Appeals finding the Texas statute unconstitutional as applied to the facts of that case. 755 S.W.2d 92 (1988). The Supreme Court addressed the case on the basis of the facts and issues found by the Texas courts and brought before it by the State of Texas.

During the Republican National Convention in Dallas in 1984, Gregory Lee Johnson participated in a demonstration against nuclear war protesting the policies of the Reagan Administration and certain Dallas-based corporations. The demonstration ended at the City Hall where Johnson burned an American flag that one of the participants had taken from a flagpole along the way. While the flag burned, the protestors chanted, "America, the red, white and blue, we spit on you."

Johnson was promptly arrested under a Texas statute which makes it a misdemeanor intentionally or knowingly to desecrate, among other things, a state or national flag in a way "that the actor knows will seriously offend one or more persons likely to observe or discover his action." Tex. Penal Code Ann. § 42.09 (1989). It was not charged that the flag was public property or that Johnson knowingly received and destroyed stolen property. Although several persons testified that they were seriously offended, no breach of the peace actually occurred and none was threatened because of the burning of the flag. In support of the conviction under the State statute, Texas asserted the State's interest in (1) preventing breaches of the peace by those seriously offended by such conduct, and (2) preserving the flag as a symbol of nationhood and national unity. The Supreme Court concluded, as had the Texas Court of Criminal Appeals, that neither was sufficient to survive 'the most exacting scrutiny' required by the First Amendment under the facts of this case. 57 U.S.L.W. at 4774 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

A First and Fourteenth Amendment[1] issue was raised by the fact that the flag was burned by Johnson as an expression of a political opinion in opposition to the perceived actions and policies of a Presidential Administration and certain corporations regarding nuclear arms. We might add that the nature of the expression was made more pointed because it occurred during and at the site of a national political convention. Johnson's actions in a clear but offensive way communicated the political views of himself and others participicating in the protest and was so understood by the onlookers. The State of Texas conceded that Johnson's actions constituted expressive conduct. The offending conduct under the circumstances received, as was no doubt calculated, much more attention than words alone. Hence, freedom to express a disagreeable idea was involved. In earlier cases the Supreme Court had equated freedom of expressive conduct with freedom of speech under the protective cloak of the First Amendment, but with reservations as to the permissible limits of the conduct.[2] To note two examples, one could not with impunity deface the Washington Monument or assassinate a public official in order to express a political opinion.

The majority in Texas v. Johnson (Justices Brennan, Marshall, Blackmun, Scalia and Kennedy) disposed of the State's reliance on its interest in preserving order by noting that no breach of peace occurred or was even threatened. The Court rejected Texas' arguments that it was sufficient to show a potential for a breach of the peace and that every flag burning had that potential. It held that Johnson's conduct did not "fall within that small class of 'fighting words' that are 'likely to provoke the average person to retaliation and thereby cause a breach of the peace.'" According to the Court, no "reasonable onlooker" would consider Johnson's action "as a direct personal insult or an invitation to exchange fisticuffs."

---

[1] The First Amendment applies to the states by incorporation under the Fourteenth Amendment. See, e.g., Gitlow v. New York, 268 U.S. 652 (1925); Edwards v. South Carolina, 372 U.S. 229 (1963).

[2] The Supreme Court has held repeatedly that symbolic conduct falls within the First Amendment when an "intent to convey a particularized message" is present and when "in the surrounding circumstances the likelihood [is] great that the message would be understood by those who [view] it." Spence v. Washington, 418 U.S. 405, 410-11 (1974). Indeed, for twenty years prior to Texas v. Johnson, the Supreme Court had reversed all convictions of political protestors charged with abusing the flag. See, also Street v. New York, 394 U.S. 576 (1969), and Smith v. Goguen, 415 U.S. 566 (1974).

The Court then addressed the State's claim that the conviction was necessary to preserve the flag as a symbol of nationhood and national unity. The Court held that it is a "bedrock principle underlying the First Amendment . . . that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive and disagreeable." It further held that the government could not require that "designated symbols be used to communicate only a limited set of messages." It found "no indication" either in the text of the Constitution or in the Court's earlier decisions "that a separate juridical category exists for the American flag alone." It affirmed the judgment of the Texas Court of Criminal Appeals.

THE CONSTITUTIONAL AMENDMENT

We express first our distaste for seeing national symbols publicly abused. However, it is a central and well established principle under the First Amendment that the majority may not suppress a dissident view simply because it is distasteful.

The amendment proposed by the Administration reads as follows:

> The Congress and the States shall have the power to prohibit the physical desecration of the flag of the United States.

The so-called "flag amendment" to the United States Constitution should not be proposed by the Congress or ratified by the States for the following reasons: (1) it would constitute an unwarranted restriction of freedom of speech and expression under the First Amendment; (2) to amend the Constitution so as to criminalize a symbolic protest because it is offensive to a large majority of the people would create a dangerous precedent for the future when other very offensive symbolic protests may arise; (3) it is unlikely that the amendment would increase respect for the American flag, here and abroad, and it is not needed to enhance that respect; and (4) it is predictable that the arrest of persons for offensive but nonviolent political or social protest would create martyrs of otherwise insignificant dissidents, give impetus to the dissenters' cause, and, in the final analysis, lessen respect for the flag.

The Texas statute points up clearly the issue of freedom of speech and expression. Unless the "actor" knows that the action "will seriously offend one or more persons likely to observe or discover his action," no crime is committed by the desecration of the flag. Ordinary speech needs no First Amendment protection but only that speech which may offend the officers of government or some significant part of the populace. It is from its application in such instances that "freedom of speech" has become such a hallowed principle for all thoughtful patriots of this country and a badge of national honor respected throughout the world. We do not see how Johnson's conviction for a nonviolent political expression could have been upheld without seriously encroaching on our First Amendment concepts--especially the principle that expression of an idea may not be penalized simply because the idea is offensive or disagreeable, a principle at the core of First Amendment interpretations for half a century. Stromberg v. California, 283 U.S. 359 (1931); Edwards v. South Carolina, 372 U.S. 229 (1963); Police Department of Chicago v. Mosley, 408 U.S. 92 (1972); Cohen v. California, 403 U.S. 15 (1971).

We agree that the burning of the American flag as a form of political protest is very offensive to the vast majority of our citizens. On the other hand, it is just when people take great offense because of disrespect shown to an honored symbol that the right of free expression needs protection, not prosecution.

We note, too, that there are many other cherished symbols of our Nation, such as the Statue of Liberty, the bald eagle, the U.S. Capitol, the Great Seal, pictures of renowned presidents such as Washington and Lincoln, the Constitution itself, and the Bill of Rights, the desecration of which would give offense. These symbols may be equally deserving of respect along with the flag, and it is unclear to us why this amendment should protect only one of the many representations of our country's ideals. Of course, once we start down the road of designating and protecting national emblems, there is no end to the exercise.

Under our Constitution, some expression may indeed be curbed under particular circumstances. For example, speech may be punished if it is "directed to inciting or producing imminent lawless action" and is "likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Similarly, a narrow category of "fighting words" -- "face-to-face words likely to cause an average addressee to fight" -- may be punished. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). But in Texas v. Johnson, there was neither the "incitement" nor the "fighting words" found in those cases. Moreover, any curb on speech or expressive conduct that turns on the offended reaction of the audience must be very cautiously used lest the opponents of the offensive and unpopular expression be able to withdraw the right of free speech simply by creating a disturbance.

Why is the American flag the world's greatest symbol of freedom? Certainly, it is not because a powerful government and a vocal majority can suppress any manifestation of dissent by either word or expressive conduct or both. The Chinese students in Tiananmen Square dramatically expressed their appreciation of our freedom when they came forward with a replica of the Statue of Liberty. It was electrifying and immediately understood around the world. No words were necessary. The act was political and very offensive to the leaders of the Chinese government.

This was a thrilling endorsement of our basic principles of freedom, in which freedom of speech is a foundation stone. With this fresh in our minds, it seems incongruous that so many among our people would so soon seek for the first time in almost 200 years to amend our basic Constitution to put limits on freedom of speech, and all because a disagreeable dissident offended people by burning the American flag in a political protest at the site of a political convention.

There are many components of the symbolism which causes the American flag to be so highly honored. Among these are national honor and integrity, a spirit of equality and democracy, freedom of religion, freedom from abuses by government or by a majority against a minority, but certainly in the forefront is freedom of speech. Just as the freedom of religion would not be furthered by a governmental effort to direct worship into channels favored by the majority, freedom of speech is not furthered by an effort to restrict speech or expressive conduct where it harms no one but is seriously offensive to many. These are the very circumstances under which the true meaning of *freedom* of speech is tested and proved.

Recently, in a letter to the Editor of the *Washington Post* (July 11, 1989), a former American POW, who spent 13 months in solitary confinement and received a Silver Star and two Purple Hearts, wrote of his reaction while in captivity to news that Americans were burning the flag in protest to the war. Throughout his captivity, he was tortured and abused in an effort to get him to admit he was wrong to fight in Vietnam. His Communist captor told him that a picture of flag-burning was proof that he was wrong. His response is worth quoting:

> 'No. It proves that I am right. In my country we are not afraid of freedom, even, it if seems that people disagree with us.' The officer was on his feet in an instant, his face purple with rage. He smashed his fist onto the table and screamed at me to shut up. While he was ranting, I was astonished to see pain, compounded by fear, in his eyes. I have never forgotten that look, nor have I forgotten the satisfaction I felt at using his tool, the picture of the burning flag, against him.

Although the terms of the amendment proposed by the Administration are simple, they hide a host of problems which would arise also under legislation enacted without authorization of an amendment. These problems are discussed under the following section of this report.

For the reasons indicated, the Task Force strongly and unanimously recommends to the House of Delegates that it resolve that the American Bar Association opposes an amendment to the Constitution to authorize Federal or State statutes to criminalize the desecration of the American flag as part of a political protest. No amendment, and indeed no new statute, is needed where the offensive action is committed for the purpose of inciting to riot or otherwise causing a breach of the peace or with the knowledge that there is an imminent danger that the offensive act will have this effect. Landmark Communications v. Virginia, 435 U.S. 829, 843 (1978). Otherwise, political protests should retain their protected position under the First Amendment. It is an act of patriotism to defend our Nation's basic principles of freedom when they are threatened. Now is such an occasion!

PROTECTION OF THE FLAG BY LEGISLATION

The Task Force cannot speak categorically about the many bills now being proposed in the Congress directed toward criminalizing desecration of the flag by statute rather than by constitutional amendment. We have not had an opportunity to study all the bills, and no legislative reports have yet been issued on them. It appears that the pending bills generally follow the pattern of legislation proposed by the Chairman of the Senate Judiciary Committee and the Majority Leader in the House which provides that all physical abuse of the flag, whether or not done to communicate a thought or express a protest, shall be illegal and shall subject the offending person or persons to criminal prosecution. The basic infirmity of these proposals is that they might validate prosecution of those physically abusing the flag without intending to express a contemptuous or dissenting view but would run afoul of Texas v. Johnson and fail on constitutional grounds in those cases where the flag is burned or otherwise abused in an effort to dramatize a protest or communicate a dissenting view.

The bills suffer from the further deficiency that, if enacted and actively enforced, they could lead to prolonged controversy and litigation over their meaning and limitations. A

Federal statute currently subjects to criminal prosecution anyone who "knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it . . ." 18 U.S.C. § 700(a). The "flag" is defined to include:

> [A]ny flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America.

18 U.S.C. § 700(b).

This very broad definition of "flag" could be applicable under the proposed "flag legislation" or would be available for inclusion by the states in legislation adopted pursuant to the flag amendment. See Testimony by the Assistant Attorney General, Office of Legal Counsel of the United States Department of Justice, before the Subcommittee on Civil and Constitutional Rights, Judiciary Committee, U.S. House of Representatives, July 19, 1989. Under such statutes, the act of burning or destroying in a political protest even a paper representation of any flag, standard, colors, or ensign of the United States would be criminalized. Thus, extended controversy and litigation could arise over what the average person "without deliberation" may believe to be a representation of "any flag" of the United States.

The Department of Justice also pointed out to the Subcommittee the wide latitude that could exist in the determination by the states of what conduct could be brought within such terms as "desecration" or "physical desecration."

In addition, the bills raise the issue as to whether various commercial uses of the flag would be prohibited, and what would be the effect of legislation regulating commercial use in some states but not in others.

Whatever the state or federal legislation on the subject, we can be sure that political protests against actions of the Federal Government will continue to be made by both words and expressive conduct. We can also be assured that legislation such as that being proposed will violate the principles of Texas v. Johnson when applied to desecration of "the flag" as an act of political expression. Yet, desecration of the flag as a political protest is the real target of the legislative proposals. It would thus seem not only futile but also irresponsible for the Congress to enact legislation which would directly challenge a recent decision of our highest court. This would seem especially inappropriate where the Supreme Court decision had upheld the First Amendment's basic principle of Freedom of Speech.

Such legislation would divert attention from consideration of what it is that the American flag really stands for in such situations. Is it the power of the state to compel respectful conduct towards its flag? Or is it the confidence of the state and its people that the fiber of the Nation is strengthened where it can tolerate a free market of ideas, even political ideas and expressions which are obnoxious to the majority of its citizens, and, indeed, can learn and benefit from them? The questions answer themselves.

It is for these reasons that the Task Force recommends opposition to the flag legislation now being proposed to the Congress.

CONCLUSION

All through human history, tyrannies have tried to enforce obedience by prohibiting disrespect for the symbols of their power. The swastika is only one example of many in recent history. The American flag commands respect and love because of our country's adherence to its values and its promise of freedom, not because of fiat and criminal law.

The spirit of the First Amendment's guarantee of freedom of speech is captured for many of our citizens by the well-known words attributed to Voltaire, even before the adoption of our Constitution: "I disapprove of what you say, but I will defend to the death your right to say it."[3] The familiar words of Justice

---

[3] As attributed in J. Bartlett, Familiar Quotations, 344 n.5 (15th ed. 1980):

> This sentence is not Voltaire's, but was first used in quoting a letter from Voltaire to Helvetius in The Friends of Voltaire (1906) by S.G. Tallentyre (E. Beatrice Hall,). She claims it was a paraphrase of Voltaire's words in the Essay on Tolerance: Think for yourselves and let others enjoy the privilege to do so too.
>
> Norbert Guterman, in A Book of French Quotations (1963), suggests that the probable source for the quotation is from a line in a letter to M. le Riche (February 6, 1770): "Monsieur l'abbe, I detest what you write, but I would give my life to make it possible for you to continue to write."

Brandeis, concurring in Whitney v. California, 274 U.S. 357, 377 (1927), brought Voltaire's thoughts to the United States and into this century:

> If there be time to expose through discussion the falsehood and fallacies [of offending speech], to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Or, as Justice Jackson wrote for the Court in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943), a flag salute case:

> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

It is the hope of the Task Force that this thought, having flourished in the First Amendment until almost the end of the Twentieth Century, will be carried unfettered into the Twenty-First.

The Task Force consists of the following members of the American Bar Association who, together with the Task Force's special consultant, Lawrence M. Baskir, are unanimous in their approval of the foregoing recommendations and report: Barbara A. Black, Warren Christopher, Erwin Griswold, Gerald Gunther, Robert McKay, Earl Silbert, Randolph Thrower, and Cyrus Vance.

Respectfully submitted,

Randolph W. Thrower
Chair

August, 1989

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July 13, 1989

The Honorable Joseph R. Biden
U.S. Senate
Washington, D.C.

RE: REQUEST TO TESTIFY CONCERNING FLAG DESECRATION AMENDMENT
PRACTICAL PROBLEMS INVOLVING ANTI-FLAG-DESECRATION AMENDMENT

Dear Senator Biden:

I am writing to request the opportunity to testify at any hearings to be held concerning a proposed amendment to permit desecration of the American flag to be made illegal, and to suggest that -- in addition to legal and policy arguments against such an amendment -- there would be at least three major practical problems.

I.

Any person intent on expressing a political view by burning an American flag could achieve his purpose, despite such an amendment, simply by burning something that looked very much like an American flag -- e.g., a flag with 49 or 53 stars, 15 instead of 13 stripes, etc. -- but wasn't really one.

While to observers he would seem to be burning the true American flag, he would not technically be in violation of any amendment or statute which protected only the "flag of the United States." Indeed, courts might find it impossible to convict since the object itself would no longer exist as evidence, and few witnesses could swear with certainty that what was burned was a real -- rather than a close lookalike -- American flag.

The alternative -- to draft a constitutional amendment to protect "any object which is or might to a casual observer appear or give the impression of being an American flag" -- would create a much larger exception to the Constitution than has heretofore been discussed.

II.

A person seeking to express contempt for the American flag could likewise achieve his purpose simply by burning a picture of the American flag; i.e., something which even to the casual observer is clearly not a flag, but which represents and embodies the flag and provokes the same strong patriotic feelings.

Indeed, since the "flag of the United States" is two sided, a full-size picture of an American flag, or even a piece of cloth with an American flag replica on only one side, would not technically be an "American flag" protected by the amendment, although the effect of burning it is likely to be virtually the same on those who feel most strongly about the issue.

To deal with those very real problems would require a constitutional amendment protecting not just the "flag of the United States," but also pictures and other representations of the American flag -- a protection so broad that it might even include Uncle Sam's hat!

III.

As illustrated very dramatically by a news broadcast on the 4th of July showing veterans burning dozens of American flags, burning a flag as a means of destroying a worn out one is certainly not considered unpatriotic.

A constitutional amendment or statute which exempted the burning of a worn out flag would permit activists to burn such flags as a means of showing contempt or hatred of them, and/or raise serious questions about whether or not the flag which was burned was in fact worn out.

The alternative, drafting a criminal statute to require proof beyond a reasonable doubt that the burning be done with the intent to express a point of view, could likewise make prosecutions very difficult. Imagine defendants claiming that it was simply fortuitous that they chose a particular rally to burn a worn out American flag!

SUMMARY

In summary, any amendment seeking to prevent the burning of the American flag would have to deal with serious problems of: (1) real flags and lookalikes, (2) pictures or depictions of real flags, and (3) burning as a legitimate means of disposing of worn out flags. These problems should be considered along with the other legal and policy arguments relating to this issue.

To discuss these views, which I have not previously heard expressed, I respectfully request the opportunity to testify at hearings concerning this issue.

Yours truly,

John F. Banzhaf

John F. Banzhaf III
Prof. of Law & Legal Activism

Emergency Committee to Defend the First Amendment

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James H. Warner
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STATEMENT

The First Amendment embodies this nation's strong commitment to free expression. It has stood for nearly 200 years as a guardian against government censorship or limitation of vigorous public debate. We disagree with any effort to restrict the First Amendment by constitutional amendment.

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OUR FILE:

September 18, 1989

The Honorable Joseph R. Biden, Jr.
Chairman, Senate Judiciary Committee
Members of the Judiciary Committee
Senators of the United States
Dirksen Senate Office Building, Room 224
Washington, D.C. 20510

Re: The Effort to Take Political Prisoners in America
By Outlawing Symbolic Expression Toward the Flag

Dear Chairman Biden and Senators:

In accordance with permission extended by Chairman Biden, I am offering this letter and an article[1] I wrote as my testimony on the subject of "flag desecration." I thank the Chairman for this opportunity to present my views.

I watched and listened in dismay to the House of Representatives debate on this subject shown on C-Span a few days ago. Although Congress has steadfastly opposed political tyrannies throughout this century with the nation's blood and treasure, House member after member arose to argue the fine points of how best to take "political prisoners" in America, that is, by constitutional amendment or statute. Representatives unabashedly referred to those who would be punished as "political protesters."

1/ This article appeared in the Chicago Daily Law Bulletin on July 24, 1989. Earlier, on July 4, 1989, the Chicago Tribune carried a condensed version of the article. An in-depth treatment of the subject is now being prepared at the invitation of the Northern Illinois Law Review.

Those favoring an amendment expressed concern that some protesters might escape punishment by employing a "dirty flag" defense available under the statute. Of course, burning a soiled flag is regarded as patriotic and in accordance with established flag etiquette. Recently, a local newspaper carried a front page picture of 50 American flags, presumably old or dirty, being burned in Iowa at a public ceremony held by the American Legion. The Legion's purpose was to demonstrate "the right way" to burn flags. Imprisoning persons on the basis of distinctions of this kind, which have to do with political attitude, as opposed to intended conduct, is not a legitimate function of the criminal law and would be appropriate only in a police state.

Ironically, those who favored a statute over an amendment did so on the ground that they did not want to tamper with the Bill of Rights as a constitutional document. However, tampering with the substantive right of free expression contained in that document apparently posed no problem! Frankly, I could not believe that intelligent Americans, who presumably believe in our highly valued and hard won freedoms, could be holding such a discussion.

I had to ask myself if this was a caricature of the debate held by the Chinese leadership last spring when it decided what to do with the political protesters in Tiananmen Square. The basic differences between these two situations are of degree. The proponents of flag desecration laws have presently confined their proposed restriction on political expression to one available means only, and as yet no one has suggested that political protesters, who might utilize those means be shot.

And just what conduct is it that Congress now seeks to outlaw? Do the proposals for imprisoning our citizens relate to the protection of person or property, or, indeed, anything that impinges on anyone's rights? Of course not. What is sought to be punished is the mere refusal of a very small number of people to accept the political values and beliefs of the overwhelming majority, and who, on rare occasion, have the temerity to symbolically express that refusal in a manner that the majority finds highly offensive. This is necessarily the essence of political thought and protest. It is precisely what the First Amendment was designed to protect.

At one fell swoop, a so-called flag desecration statute or constitutional amendment will 1) reduce our flag to a mere piece of cloth instead of an emblem that symbolizes the Constitution's majestic values, because those values will have been seriously undermined, 2) establish a tyranny of the majority, 3) allow for the establishment of an American system of mini-Gulags for political prisoners, and 4) relegate to footnote status in constitutional history the remarkable landmark teachings found in the late Justice Robert Jackson's opinion in West Virginia State Bd. of Edu. v. Barnette, 319 U.S. 624, 87 L.Ed. 1628 (1943). That Supreme Court case, a hallmark in First Amendment thought, stands for some of the following propositions:

1. The purpose of flags, including the American flag, is to communicate political ideas.

2. There is "no mysticism in the American concept of the state"; therefore that concept, as well as all other ideas, including those embodied in the flag, cannot be established by government as "sacred." Absent "sacred" ideas, the government can have no religious icons (the flag included) which, by definition, are subject to "desecration." Of course, as with all ideas or objects which symbolize them, each individual, by conscience as opposed to government fiat, is free to view or hold the flag in whatever esteem desired, including regarding it as sacred.

3. The purpose of the First Amendment is to protect the communication of the most extreme and expressive minority opinion from an offended majority. A necessary concomitant purpose is that the First Amendment is not to be subjected to majoritarian efforts to change it. Popular views usually require no protection.

Furthermore, the Barnette case makes clear that there can be no such thing as a "content neutral" flag law, as now proposed, which will pass constitutional muster. Since, as Justice Jackson said, "a person gets from a symbol the meaning he puts into it," a statute, no matter how drafted, can be no more content neutral than the flag itself or an act of so-called desecration. Congress either will or will not have a rationale for passing such a law. If, as everyone knows, its rationale is to protect the sensibilities of offended Americans from perceived symbolic assaults on the nation or its values, the purpose of the statute is necessarily to punish the communication of content.

On the other hand, if Congress has no rationale for passing the statute, but is simply whimsically and arbitrarily prohibiting certain acts for no reason, the statute would offend substantive due process rights found in the Fifth Amendment. Congress cannot, consistent with the Constitution, imprison citizens without reason.

Political leadership dedicated to preserving the First Amendment must avoid pandering to the emotional tides of the majority when to do so places the Constitution in jeopardy. Likewise, it must not be intimidated by those who do. Rather, it should educate the public to the majestic values that are embodied in opinions like Barnette and, indeed, in the flag itself. That opinion warned that what may start as minimal measures to suppress dissent may end in the extermination of dissenters. Therefore, Justice Jackson said the First Amendment "was designed to avoid these ends by avoiding these beginnings."

The tone of this communication may appear to be strong and impatient. It is not meant to be offensive or disrespectful. However, for the reasons stated, I am convinced that a law which forbids acts toward an inanimate object under pain of imprisonment necessarily establishes a political crime and will therefore result in the taking of political prisoners. If a rational explanation to the contrary exists, I will recant this testimony. Otherwise, I say HELP! STOP THE MADNESS! DON'T TAKE POLITICAL PRISONERS IN AMERICA! DON'T ALLOW THE "BEGINNINGS" OF A POLICE STATE! KEEP AMERICA THE LAND OF THE FREE!

Thank you for your consideration and for allowing me to present this testimony.

Sincerely,

Stuart Lefstein

Stuart R. Lefstein

SRL/eas

2—CHICAGO DAILY LAW BULLETIN Monday, July 24, 1989

Flag desecration: The ultimate free speech question

By STUART LEFSTEIN

Very few would quarrel with President Bush's description of flag burning as "wrong." To many of us, like myself, the American flag represents an enduring symbol of the highest ideals to which mankind has aspired.

In wartime our soldiers have carried the American flag into battle, "saving the colors" at all costs. Among my favorite monuments in Washington is the memorial to the five marines and a navy hospital corpsman who raised our flag at Iwo Jima during World War II.

That monument — the backdrop for the president when he called for an anti-desecration amendment — poignantly depicts the great struggle that the U.S. endured in defeating the forces of tyranny and in preserving the values found in our Constitution.

A few Americans, however, fail to see in our flag the lofty ideals so many of us believe it symbolizes. When one of them feels so aggrieved that he resorts to burning the flag to show his disrespect for the country, we see in such an act the symbolic destruction of precious values. Because of such feelings, both houses of Congress passed resolutions condemning the Supreme Court decision upholding a Texas appellate court's ruling that had freed Gregory Johnson from a year's prison sentence for burning a flag. It appears clear that the overwhelming majority of the public agrees with the Congressional resolutions and disapproves of the court's ruling.

But are the public and Congress correct? Do the hallowed ideals for which the marines raised the flag at Iwo Jima really permit us to imprison our citizens for essentially political reasons?

Paradoxically, the principles governing the result in the flag burning case were laid down in 1943 during the height of war when patriotism was justifiably at a fever pitch. Speaking through Justice Robert Jackson, the eventual chief American war crimes prosecutor at Nuremberg, the Supreme Court found unconstitutional a West Virginia law that compelled schoolchildren to say the Pledge of Allegiance.

Using magnificent prose, Justice Jackson erected one of the First Amendment's most significant landmarks. At the heart of the decision was the court's specific rejection of the idea that compulsory measures regarding the flag could be employed to achieve national unity.

Justice Jackson noted that efforts of governments and other groups to obtain compulsory unification of opinion often end in the extermination of dissenters, resulting in "only the unanimity of the graveyard."

He also said that freedom to differ is not limited to things that don't matter much, because that would be "a mere shadow of freedom." Instead he observed that freedom to differ extends to "those things that touch the heart of the existing order."

He concluded that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, or force citizens to confess by word or act their faith therein."

Justice Jackson was also quite explicit as to the nature of the American flag. It possessed no supernatural or religious characteristics. "There is no mysticism in the American concept of the state or of the nature or origin of its authority," he wrote.

The threshold principle emerging from the West Virginia case is that flags and gestures toward them furnish a "primitive but effective way of communicating ideas," thoughts and attitudes.

In the present controversy, a notion has surfaced that the physical integrity of the flag can be protected without necessarily punishing a person for harboring bad thoughts about the flag. However, since the very purpose of federal and state flag desecration laws is to punish disrespectful attitudes, this notion has no validity. In arguing the case before the Supreme Court, the State of Texas agreed that Gregory Johnson was prosecuted for communicating his unpopular views about the flag.

Burning the flag without a perceived improper attitude has not been regarded as something to be suppressed. To the contrary, an act of Congress urges that an old flag which "is no longer a fitting emblem for display should be destroyed in a dignified way, preferably by burning."

In that context most of us would have no difficulty in viewing the burning as an act of reverence toward the flag. Similarly, in a given protest persons who share the protester's ideology might regard a flag burning as respectful. For example, if a flag burner made a statement that the country should commit to new values or give new meaning to old values, his supporters might conclude he had symbolically purified and honored the flag in the same way an old flag is honored by burning when it "is no longer a fitting emblem for display."

The point is that where symbolic conduct occurs, the message is in the eyes of the beholder. As Justice Jackson said, "a person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." The last thing this country needs is "thought police" to determine whether a flag burner's attitude is respectful or contemptuous.

An actual case that graphically shows how flag desecration laws are used to punish the communication of unpopular views or attitudes, as opposed to conduct, occurred 19 years ago in downstate Illinois.

In May 1970, following the invasion of Cambodia and the shootings at Kent State, three college women said prayers over a small flag that was old and dirty. They then burned it. One of the women explained the ceremony in some rather eloquent court testimony.

". . . I tried to explain why we were burning the flag and I said that the flag was dirty on two levels; on the first level it was dirty because it was oily and greasy and dirty . . . and it was no longer a fitting display of our country. It used to be a beautiful symbol but that particular flag was no longer beautiful and we were burning it because that was the proper way to get rid of dirty flags. And on the second level, symbolically it was dirty with blood from Southeast Asia and blood from the students that were killed at Kent State the day before. . . . I said that the concepts that the flag are based upon are beautiful and that our flag is a beautiful symbol . . . but the country has strayed from the concepts set down in the Constitution that the flag is supposed to represent, and we must burn the flag and . . . return to the path."

That court testimony didn't save them from conviction. This was despite the fact they had literally complied with the act of Congress that allows old flags to be destroyed by burning. The prosecutor and court chose to ignore the "pure" thoughts about disposing of an old flag and focused only on the supposed "impure" thoughts about Kent State and Southeast Asia.

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Presumably, if the precise same act of burning the identical flag had been at the hands of Girl Scouts who had recited only the prayer about old flags, there would have been a commendation, not a conviction.

If we assume, however, that the flag had not been old and dirty but instead was a new one, how do we decide that the three college women had shown disrespect or contempt for the flag? While most Americans, even those who shared the views of the women on Southeast Asia, would have rejected flag burning as a means of protesting the events of the day, could not other reasonable Americans holding those same views have concluded that in their prayer and commitment to "return to the path," the women had symbolically honored the flag?

In that same case a passing motorist stopped and trampled on the burning flag to put out the fire. The Illinois statute makes criminal an act of "trampling" on the flag. Needless to say the motorist was not prosecuted. Why? Because his thoughts were obviously judged by the prosecutor to be correct or "pure." He was trying to counter what the women were doing and in the prosecutor's mind was therefore not casting contempt on the flag.

But suppose, however, the passing motorist wore a peace sign around his neck and had said that he agreed with the women. He simply trampled on the flag to stamp out the fire so that the mutilated remains could be preserved as a symbol of the moral and spiritual mutilation of the country. Might a prosecutor and court then have concluded that the motorist had indeed shown disrespect and contempt for the flag in his act of trampling? Again, the message depends on the eyes and mind of the viewer.

What the Supreme Court really decided in the flag-burning case was the ultimate free speech question, which is whether in a free society there can be any idea, or an object that symbolizes an idea, that the government may establish as "sacred." The Court obviously said no. In effect, it adopted Justice Jackson's conclusion that since there is "no mysticism in the American concept of the state," there can be no power to declare the flag or other inanimate objects "sacred," no matter how universally revered.

By definition, that which is not "sacred" cannot be desecrated. In short, the treasured ideals that the flag embodies preclude the government from establishing them as a state imposed faith. Absent such a compulsory faith, the government can have no indestructible religious icons, including the flag.

The Supreme Court decision means that the federal and state governments will not be allowed to take "political prisoners" as totalitarian governments do whenever dissidents and protesters oppose them. However, the current effort to amend the Bill of Rights suggests the potential fragility of our free institutions when the rights of a small detested minority are at stake. But Justice Jackson reminded us that the Bill of Rights was to protect minorities from the possible tyranny of the majority. He said:

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials . . . One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

We all applauded when the heroic Chinese students accepted our American values and engaged in protest in Beijing. Somehow the irony of applauding dramatic American style dissent and protest abroad, while seeking to stifle it at home, has been lost upon our leaders. In observing that the compulsory unification of opinion "achieves only the unanimity of the graveyard," Justice Jackson pointed out that the First Amendment "was designed to avoid these ends by avoiding these beginnings." While no one should confuse Texas with the murderous government in Beijing [there a flag burner would have been shot], sentencing a young person to prison for a year for engaging in protest is one such "beginning."

Justice Jackson admonished us that we can "apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization."

To conclude that if our Constitution protects flag burners "patriotism will not flourish ... is to make an unflattering estimate of the appeal of our institutions to free minds."

In short, the flag and our institutions will survive all of the Gregory Johnsons of America without sending them to prison, as long as we revere not just the flag itself but the principles and values for which it waves.

Texas v Johnson: Moral Legitimacy For United States Proclamations

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Arnold H.Loewy

ESSAY I

TEXAS v JOHNSON: MORAL LEGITIMACY FOR UNITED STATES PROCLAMATIONS

On June 22, 1989, the two leading stories headlined on the front page of the New York Times were entitled "JUSTICES, 5-4, BACK PROTESTERS' RIGHT TO BURN THE FLAG" and "3 Chinese Are Executed in Public For Their Role in Shanghai Protest -- U.S. and Other Lands Denounce Move by Beijing." This essay is about the interrelationship between these stories.

To fully perceive the interrelationship of these stories, let us imagine the switch of one vote in Texas v. Johnson,[1] so that Texas had prevailed. The first New York Times headline would have read: "JUSTICES, 5-4, UPHOLD YEAR'S IMPRISONMENT FOR PROTESTER WHO BURNED THE FLAG." A neutral newspaper, such as the Tokyo Times might have had the following headlines: "Some Chinese Protesters Executed, Others Imprisoned,[2] United States Protester Imprisoned."

Lest there be any doubt about the similarity of the protests, at least from the perspective of the protesters, Gregory Johnson (the respondent) and his friends perceived themselves as international Communists, who were generally protesting the renomination of Ronald Reagan at the 1984 Republican National Convention and specifically protesting the American Flag as a symbol of international oppression. Only the most chauvinistic American could possibly claim that a Communist's challenge to United States policies is different in principle from a democratic challenge to Chinese policies.

I do not suggest that there are no relevant differences between the hypothetical affirming of Johnson's conviction and the Chinese executions. Indeed, there are at least three. First, the severity of the penalties are strikingly different.[3] Second, Johnson had greater procedural protection. His case reached the Supreme Court nearly five years after his protest. During that interval, three other courts heard his case.[4] Finally, such a conviction would have only limited how Johnson could protest, not whether he could protest. Such is not the case with the Chinese protesters.

While these distinctions must be noted, they should not be overemphasized. The first two relate to our commitment to proportional punishments and procedural due process. They are not related to freedom of speech at all. The third distinction, though more significant, is still somewhat illusory. If the Chinese students were punished for putting their Statue of Liberty in Tiananmen Square on the ground that this particular form of criticism was too inflammatory, we would not have been satisfied with the explanation that only one form of protest had been stifled. At best we would have considered it a small step better than an outright ban on dissent. It is, of course, easier to see the impact of a "how" limitation on dissent when we support the dissenters.

Perhaps a true "how" limitation would not have seemed so bad to us. If, for example, the Chinese had a general prohibition against erecting statues in Tiananmen Square, the impact of that limitation on the right to dissent would have seemed more justifiable. It is tempting for those of us who love the flag and all that it stands for to accept Johnson's conviction as analagous to that anti-statue statute.

Unfortunately, such reasoning will not wash. Texas doesn't forbid all American Flag burning; only that which the burner "knows will seriously offend one or more persons likely to observe or discover his actions."[5] I do not think that we would be pleased with a Chinese conviction predicated on bringing a statue into the Square by one who "knows that he will seriously offend one or more persons likely to discover his actions." Furthermore, the Texas statute only protected the State or National flag. Consequently, one burning a foreign flag to the horror of devotees of that country's policies cannot be punished.[6] To analogize to the Chinese hypothetical, a statute forbidding only statues of liberty, but no other statue, from being erected in Tiananmen Square would be far removed from a "how" limitation on the right to dissent.

I am not suggesting that all "how" limitations are constitutionally permissible. Indeed, they quite clearly are not.[7] It is imperative, however, that we not sugarcoat a content-based, indeed viewpoint-based, discrimination under the benign mantle of a mere manner of protest regulation.

Another possible distinction between flag burning and the Chinese protests is that we seek protection from the emotional trauma of a burning flag, whereas the Chinese are worried about the dissenters' ideas being taken seriously. Of course, many efforts to punish free speech in America are motivated by a desire to protect our emotions rather than quiet our fears that the obnoxious idea will prevail.[8] If such reasons were acceptable, little would be left of freedom of speech as we know it. Indeed, if such were the international standard, it would not be difficult for the Chinese leaders to claim that their national psyche could not stand the emotional turmoil caused by the radical students in Tiananmen Square.

Compare the other great suppression incident of 1989, Iran and Salmon Rushdie, which was predicated entirely on the emotional impact of "The Satanic Verses." As we listened to Iranian explanations of the insult perpetrated upon Islam by this book, we recoiled in horror at their lack of regard for freedom of speech.[9] But I have little doubt that individual citizens of that theocratic nation felt as much pain from Rushdie's words as our most patriotic citizens felt from from Johnson's flag burning.

It is surely no answer to say that Rushdie merely wrote words while Johnson committed an act. It is the perceived assault from either message that causes the pain. Indeed, supporters of flag desecration laws typically rely on the "fighting words" doctrine which allows convictions for verbal insults uttered during face to face confrontations.[10] The only serious distinction in the two situations is the somewhat ethnocentrically myopic view that our sense of serious emotional insult is justified whereas theirs is not.

Flag Consecration: The Court's Opinion

Near the end of Justice Brennan's opinion for the Court, he observed: "We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents."[11] The negative form of this observation understates the significance of the decision. More precisely, the Court could have written: "By reversing the conviction of this flag desecrator, we consecrate the flag as a symbol of liberty. From this day forward, our Nation can condemn other nations that limit dissent, secure in the knowledge that our own house is in order." While prudence, self restraint, and an appropriate sense of judicial modesty may have precluded such language from the Court, its decision has raised, not lowered, the significance of Old Glory.[12]

Before concluding that Johnson's flag burning was protected, the Court had to determine whether it was speech. Although Texas conceded that Johnson had engaged in "expressive conduct,"[13] the Court felt it necessary to demonstrate the prudence of the concession. It quoted Johnson's explanation for his conduct: "The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a just position [juxtaposition]. We had new patriotism and no patriotism."[14] Consequently, the Court found the first amendment to be implicated.

The Court, however, emphasized that "[t]he Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."[15] Indeed, relying on United States v. O'Brien,[16] a case which upheld a conviction for burning a draft card, the Court reaffirmed its rejection of "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[17] What differentiates Johnson is that the flag burner is punished because of his message. As the Court succinctly put it: "[Government] may not, however, proscribe particular conduct because it has expressive elements."[18] That is precisely what Government did to Johnson.

The Court made short work of Texas' claimed justification for the statute. As to the argument that the statute was necessary to prevent a breach of the peace, the Court emphasized that no evidence was introduced suggesting that the peace was either breached or likely to be breached. As to Texas' claim that the flag should be preserved as a symbol of national unity, the Court found this to be related to the message and therefore impermissible. The Court did not deny, indeed it affirmed, the state's interest in encouraging proper respect for the flag. It held, however, that compulsion was not a constitutionally permissible means to encourage that end.

The Dissents

Much of Chief Justice Rehnquist's dissent supports the communicative nature of the flag. The Chief Justice quite poignantly portrays the flag's symbolic significance by skillfully interweaving Concord Hymn, The Star Spangled Banner, and Barbara Frietchie, causing at least this commentator to shed a tear over Barbara Frietchie's symboloic heroism. But this just confirms the Court's judgment that one who burns what symbolizes so much is conveying a deep disregard for this nation that probably cannot be conveyed so clearly in any other way. If any words could convey the contempt for our country as well as the burning of the symbol for which Barbara Frietchie would have sacrificed her old grey head, I have yet to hear them.

Perhaps the core of the Chief Justice's opinion is his assertion that "[t]he flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas."[19] If he is right about that then he is right about the case. But, he is not right about that! More than forty-five years ago, in another case involving the flag, Justice Jackson, usually regarded as a conservative jurist, announced what has become core first amendment doctrine: "If there is one fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[20]

Because the Chief Justice does not view the flag as a participant in the marketplace of ideas, he finds it unnecessary to respond to Justice Jackson's classic admonition. Justice Stevens' dissent, however, does attempt an answer. After first noting the obvious absence of compulsion to support the flag, Stevens contends:

> The content of respondent's message has no relevance whatsoever to this case. The concept of 'descration' does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the act will take serious offense. Accordingly one intending to convey a message of respect for the flag by burning it in a public square might none the less be guilty of desecration if he knows that others--perhaps simply because they misperceive the intended message--will be seriously offended. Indeed, even if the actor knows that all possible witnesses will understand that he intends to send a message of respect, he might still be guilty of desecration if he also knows that this understanding does not lessen the offense taken by some of the witnesses. Thus this is not the case in which the fact that "it is the speaker's opinion that gives offense" provides a special "reason for according it constitutional protection.[21]

Although Stevens deserves credit for at least trying to respond to the constitutional prohibition against prescribed orthodoxy, it is hard to believe that he really means it. Surely nobody would seriously contend that a statute prohibiting burning a cross or wearing a swastika which the actor knows will seriously offend one or more persons likely to observe or discover his actions is not based on the substance of the speaker's message. To the contrary, laws prohibiting flag burning, cross burning, and swastika wearing are all predicated on the offensiveness of the message. Thus, unless Rehnquist's withdrawal from the marketplace of ideas theory is justifiable, both dissenting opinions are indefensible.

The Chief Justice's first attempt at justification was by analogy to San Francisco Arts & Athletics, Inc. v. United States

Olympic Committee,[22] which had held that USOC's work in developing the Olympics entitled them to exclusive use of the name thereby rendering the San Francisco group's desire to sponser an event known as the "Gay Olympics" subject to an injunction. Rehnquist concluded: "Surely Congress or the States may recognize a similar interest in the flag."[23] The problem is that the interests are not similar. Without question, after the San Francisco decision, a "Gay Olympics" committee member could have burned the Olympic flag in disgust. Similarly, if Gregory Johnson had put the American flag over his international Communist office and labeled it "International Division of the United States Government," I have little doubt that he could have been enjoined.

Rehnquist next argues that Johnson's flag burning "was no essential part of any exposition of ideas, and at the same time it had a tendancy to incite a breach of the peace."[24] This single sentence interweaves three separate arguments. His first argument is that flag burning is not essential because there are other ways of conveying the same message. Standing alone, of course, this is irrelevant since there are always other ways to convey a message. If a message could be conveyed by four different methods, no one of them would be necessary because the speaker could have always used one of the other three. For this reason, the Court has said that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[25] Presumably, this reasoning applies to alternate methods as well as alternate locales.

So much is not disputed. Rehnquist contends, however, that because of flag burning's potential to cause a breach of the peace, it is analogous to fighting words, and therefore an inappropriate method of expression. This reasoning, however, is beset by classic problems of both overinclusion and underinclusion. The standard is overinclusive because it includes many flag burnings, such as the one at bar, that did not threaten a breach of the peace. It is underinclusive because it excludes many other symbols, such as a KKK burning cross or a Nazi swastika, that may be more likely to cause a breach of the peace. Beyond that, the Court's observation that Texas already has a breach of the peace statute surely does "confirm that Texas need not punish this flag desecration in order to keep the peace."[26]

The final point of the Chief Justice's "no essential part of any exposition of ideas" concept is the alleged ineffectiveness of Johnson's protest. Rehnquist contends that Johnson's act of flag burning "conveyed nothing that that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways [and] is the equivalent of an inarticulate grunt or roar."[27] To the extent that the Chief Justice is arguing that flag burning is a particularly bad way to persuade the average American that America is rotten to the core, he is, of course, correct. But that was not Johnson's intent. He sought to convey the depth of his disgust with America. And I would like to see even one of the Chief Justice's rhetorical "dozen different ways" by which Johnson could have conveyed the depth of his disgust as well.

Rehnquist next recounts the belief of former Justices Warren, Black, and Fortas that flag burning may be punished. He quotes Warren and Black simply to indicate their beliefs. He notes that Justice Fortas said: "A flag may be property in a sense; but it is property burdened with peculiar obligations and restrictions. Certainly...these special conditions are not per se arbitrary or beyond governmental power under our Constitution."[28] Whatever else might be said of the Fortas' quote (and it was from a dissenting opinion), it is not a carefully crafted argument. It is a statement that presumes no need for reasoned justification, and consequently provides none.

The Chief Justice then borrowed from an earlier Justice White opinion,[29] and argued: "There would seem to be little question about the power of Congress to forbid mutilation of the Lincoln Memorial. The flag itself is a monument subject to similar protection."[30] There are two major distinctions in the case. First, the criminality of the monument mutilator is irrespective of his viewpoint. He would (or at least should) be punished even if he extolled the virtues of the United States in luminous spray paint on the Lincoln Memorial. Second, the United States owns the one defaced Lincoln Memorial. One could not be punished for defacing his own model of the Lincoln Memorial.[31] Conversely, one can and should be punished for defacing a flag owned by the United States Government.[32]

In his penultimate paragraph, Rehnquist excoriates the Court for "conclud[ing] its opinion with a regrettably patronizing civics lecture."[33] He concludes the paragraph with his own "civics lecture": "Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people--whether it be murder, embezzlement, pollution, or flag burning.[34] Democratic theory, of course, expects the people's representatives to decide when and how to punish killers, thieves, and those who despoil the environment. It does not, however, contemplate majority control of minority expression. A Justice who chastises his brethren for a giving "civics lecture" ought to at least make sure that his own lecture is good civics. The Court's was; Rehnquist's was not.

In his final paragraph, Rehnquist laments that "[t]he government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight."[35] Even more poignantly, Justice Stevens concludes his dissent by arguing that:

> The ideas of liberty and equality have been an irresistable force in motivating leaders such as Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Phillipine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for--and our history demonstrates that they are--it cannot be true that the flag that uniquely symbolizes their power is not itself unworthy of protection from unnecessary descration.[36]

Stevens, unlike Rehnquist, at least recognizes that it is the ideas represented by the flag, and not the flag itself, for which our heroes have fought. Unfortunately, his last clause is a non *sequitur*. The appropriate concluding sentence should have been: "If those ideas are worth fighting for--and our history demonstrates that they are--it must be true that the flag that uniquely symbolizes their power cannot be made the symbol of oppression by prosecuting those who foolishly believe that our flag does not represent these cherished values."

It is understandable to me that our President, Congress, Legislators, and general populace who do not regularly study the first amendment would initially condemn the *Johnson* decision. I frankly find it harder to rationalize the opinions of the Supreme Court dissenters, who really ought to know better.

Ironies, Paradoxes and Enigmas

Rarely has any case been as beset with ironies, paradoxes, and enigmas as this one. By upholding the reversal of Johnson's conviction, The Supreme Court provided powerful evidence that Johnson's complaint against the country was unjustified. Those who have attempted to overturn the decision by constitutional amendment, on the other hand, have lent support to Johnson's claim of United States intolerance.

Similarly, those who have contended that flag burning is not speech have proven that it is. For example, George Bush's visceral reaction to flag burning is strikingly parallel to the Ayatollah's reaction to Rushdie's book (tempered, of course by the President's moderation and sense of procedural due process). And those citizens and legislators who have threatened violence to flag burners bear a scary resemblance to the Islamic faithful who have attacked those selling "The Satanic Verses." The parallel reaction of those American's to what they claim is not speech to that of the Islamic faithful to a book that definitely is speech paradoxically proves that flag burning is speech.

Yet another irony is that Johnson could have been convicted of a real crime if the Government had focused on what he did rather than on his offensive manner of displaying his contempt for the Nation. He was with a group that spray-painted several buildings, overturned potted plants, and stole an American flag from one of the buildings. Quite probably, Johnson's association with the group would have been sufficient to impose liability,[37] thereby rendering this case truly analogous to spray-painting the Lincoln Memorial. In any event, he was clearly guilty of destroying property that he knew was stolen. Yet the Government's insistence on prosecuting him for flag burning made him a first amendment hero complete with a national television stint on "Nightline" rather than the petty vandal that he was.

Further irony inheres in the timing of this case. In 1982, the Court denied certiorari in Kime v. United States,[38] a case remarkably similarly to Johnson, except that in Kime the fourth circuit had affirmed the flag burning conviction. Consequently, when the Court granted certiorari in Johnson to review a flag burning conviction that had been overturned, there was good reason to believe that the Court intended to reinstate the conviction.

Indeed, if the 1982 Court had heard Kime, it almost certainly would have upheld the conviction. That Court consisted of the four Johnson dissenters[39] plus then Chief Justice Burger, whose prior dissenting opinion indicated that he would have upheld a flag desecration conviction.[40] Thus, had Brennan's dissenting effort to grant certiorari succeeded, the Constitution would permit punishment for flag burning. Only because those Justices that wanted flag burning to be punished voted to deny certiorari was the question open for the current Court to constitutionalize the practice.

If these ironies weren't enough, the two Justices that swung the Court were Scalia and Kennedy, appointees who were attractive to President Reagan largely because of their conservative judicial philosophies. Perhaps this is not so ironic, since conservative Justices are supposed to believe in strict construction of the Constitution; and one could hardly be stricter than to take the words of the first amendment seriously even when they hurt. As Justice Kennedy put it: "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result."[41]

Perhaps the ultimate irony is that Johnson has done more to preserve the flag as a symbol of liberty than any prior decision, while the decision's detractors would allow the continued desecration of the flag by making it a symbol of political oppression.

The Hidden Dangers of a Constitutional Amendment

Many of the arguments against a constitutional amendment to overturn Johnson have already been explored. There are some hidden dangers, however, they may be even more ominous than those previously described.

By exempting only the American flag from desecration, we set that icon above all others. What does that say to the Holocaust survivor in Skokie, Illinois, who is told that despite his pain at the sight of Nazi marchers, the first amendment demands that he tolerate their ugly uniforms and swastikas?[42] What does it say to the black man who feels the same about hoods and sheets and burning crosses, but is told that the first amendment demands tolerance?[43] It says that a majority of Americans can prevent the most painful attack possible on our sensibilities by constitutionalizing the right to punish the dissident that dares attack us. But those who, for good reason, have found a symbol other than a burning flag to be the most horrid attack upon them must just sit back and take it. The United States cannot be this cruel.

If in response, one were to suggest a more sweeping amendment forbidding all symbolic hatred, where could we draw the line? Would Republicans not be allowed to desecrate donkeys, nor Democrats be allowed to desecrate elephants? If we do not eliminate all symbolic hatred, we surely will exclude someone from protection whose pain would be equal to the average American seeing a burning flag, a Holocaust survivor seeing swastika, or a black man seeing a burning cross. If we do outlaw all of these things, what becomes of our boast of freedom? Do we not then emulate the dictatorships we despise? We may become a kinder and gentler nation, and the Star Spangled Banner may still wave, but it will not be o'er the land of the free, nor the home of the brave.

The Supreme Court has struck a major blow for freedom in Johnson. Even if the Court were wrong, no constitutional amendment could be enacted which would not do more harm than good. But the Court was not wrong. It did more to preserve the integrity of the flag than any of its critics. Let's leave well enough alone.

1. 57 L.W. 4770 (1989).

2. According to the New York Times, some of the Chinese dissidents were sentenced to prison terms.

3. Perhaps less so if one takes seriously the Chinese claim that the death sentences were imposed for setting fire to a train. It is after all flag burning and not train burning that is constitutionally protected. On the other hand, the burning only occurred in response to the train's running over a group of protesters.

4. The trial court that convicted him, the intermediate appellate court that affirmed his conviction [706 S.W. 2d 120 (Tex. App. 5th Dist. 1986)], and the Texas Court of Criminal Appeals that reversed his conviction on first amendment grounds [755 S.W. 2d 92 (Tex. Cr. App. 1988)].

5. Tex. Pen. Code, sec. 42.09 (b).

6. In fact, "[o]n the same day as [Johnson's] arrest, a number of demonstrators burned the flag of a foreign country. This action lead to a brawl; nevertheless, no arrests under section 42.09 were made in connection with the incident." 755 S.W. 2d at 94, fn. 3.

7. For example, in Cohen v. California, 403 U.S. 15 (1971), the Court held that a state cannot ban certain language from public discourse even if it is prepared to do so uniformly. Consequently, it reversed the conviction of a man for wearing a jacket with the words "Fuck The Draft" emblazoned thereon. For a more detailed discussion of that case, see Essay IV, infra.

8. The Skokie litigation [See Collin v. Smith, 578 F. 2d 1197 (7th Cir. 1977), cert. den. 439 U.S. 916 (1978)] could certainly be so categorized, as could Brandenburg v. Ohio, 395 U.S. 444 (1969). Probably the civil rights demonstrators (e.g. Cox v. Louisiana, 379 U.S. 536 (1965) were prosecuted out of a fear that their ideas would become accepted, but even there, the emotional wound of seeing the demonstration must have played a role in the prosecution.

9. We also recoiled at their lack of regard for procedural or jurisdictional due process, and for their lack of any sense of proportionality in punishment. But, just as with the Chinese, these things were additional wrongs. We were independently upset with the disregard for freedom of speech.

10. See e.g. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Chief Justice Rehnquist relied on precisely that reasoning in his Johnson dissent. 57 L.W. at 4779 (See text between nn. 25 & 26, infra.)

11. 57 L.W. at 4776.

12. The same cannot be said for those public officials from the President on down, who would overturn Johnson by constitutional amendment.

13. 57 L.W. at 4772.

14. Id, quoting the record in the case.

15. Id.

16. 391 U.S. 367 (1968).

17. 57 L.W. at 4772, quoting 391 U.S. at 376.

18. Id (emphasis in original).

19. Id at 4778.

20. West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

21. 57 L.W. at 4781, quoting FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1978) (plurality opinion).

22. 483 U.S. 522 (1987).

23. 57 L.W. at 4778-79.

24. Id at 4778, relying on Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

25. Schneider v. Irvington, 308 U.S. 147, 163 (1939).

26. 57 L.W. at 4772. For a more detailed explanation of the inapplicability of the "fighting words" doctrine to flag desecration, see Loewy, Punishing Flag Desecrators: The Ultimate in Flag Desecration, 49 N.C. L. Rev. 48, 80-84 (1970).

27. 57 L. W. at 4779.

28. Id, quoting Street v. New York, 394 U.S. 576, 616-17 (1969).

29. Smith v. Goguen, 415 U.S. 566, 587 (1974) (Concurring opinion).

30. 57 L.W. at 4780.

31. A point made rather eloquently by David Cole, Gregory Johnson's attorney, on A.B.C.'s "Nightline," Thursday, June 29, 1989.

32. Ironically, the flag that Johnson burned was stolen. Consequently, he should have been subject to criminal punishment. Unfortunately, the Government did not make that an issue in the case. Thus, the case was decided on the assumption that the flag was his own. See text accompanying n.37, infra.

33. 57 L.W. at 4780.

34. Id.

35. Id.

36. Id at 4781.

37. See e.g. Tarpley v. State, 565 S.W. 2d 525 (Tex. Cr. App. 1978).

38. 683 F. 2d 1318 (4th. cir., 1982), cert den. 459 U.S. 949 (1982).

39. Rehnquist, White, Stevens, and O'Connor.

40. Spence v. Washington, 418 U.S. 405, 416 (1974).

41. 57 L.W. at 4776 (Concurring opinion).

42. See Collin v. Smith, 578 F. 2d 1197 (7th Cir. 1977) (cert den., 439 U.S. 916 (1978).

43. See Brandenburg v. Ohio, 395 U.S. 444 (1969).

PUNISHING FLAG DESECRATORS: THE ULTIMATE IN FLAG DESECRATION

ARNOLD H. LOEWY*

> *A man's maturity is measured by his ability to tolerate those who criticize him, disrespect him, even abuse him—surely we can demand no less from our country.*†

They used to say "actions speak louder than words"; today they say "the medium is the message."[1] But, however it may be expressed, it is apparent that many thoughts can be conveyed better by action than by word. Thus, where action is "closely akin to pure speech," it is imperative that it receive first amendment protection. Although this principle is not disputed as a general proposition,[2] there is considerable reluctance to apply it to those who would desecrate the American flag.[3] Such reluctance is understandable inasmuch as the American flag is the great symbol of our cherished liberties. Paradoxically, however, it is precisely because it symbolizes freedom that we, the American people, desecrate it far more than the disillusioned flag desecrator when we punish him for his despicable act. He as an individual may not understand the meaning of freedom and all that the flag symbolizes. However, we as a nation should understand freedom and should not let our love and reverence for the flag pervert the very freedom for which it stands.

In the three act play which follows, I hope to demonstrate the frequent incompatibility between flag desecration laws and the first amendment.

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† Attributable to the author.

[1] A phrase popularized by Marshall McLuhan. H. M. MCLUHAN, UNDERSTANDING MEDIA 7 (1964).

[2] *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503, 505-06 (1969).

[3] *See, e.g.*, Street v. New York, 394 U.S. 576 (1969) in which four Justices (Warren, Black, White, and Fortas) indicated the inapplicability of the principle to flag desecrators while the remainder of the Court carefully avoided expressing any opinion on the question. See also Cowgill v. California, 396 U.S. 371 (1970) (per curiam).

ACT I

Scene 1

(Ivan Ivanavitch, a naturalized American citizen who had immigrated from Russia ten years ago, answers the doorbell of his New York City apartment at 9:00 A.M., October 1, 1970, and sees his brother Igor, who had been living in Russia and from whom Ivan had not heard in five years.)

Ivan: What are you doing here? I thought that you were still in Russia.

Igor: I was, but I escaped from a Siberian prison camp and managed to get over here to join you in this land of freedom.

Ivan: What on earth were you in prison for?

Igor: I was so disgusted with my country for crushing the Czechoslavakian revolution that I took my Russian flag to Red Square in Moscow, shouted "if our country is going to mistreat the Czechoslovakian people, we don't need any damned flag," and burned my flag. Naturally I was immediately arrested, convicted, and sent to a Siberian prison camp.

Ivan: Gee, isn't that a coincidence; I did the same thing. After learning of the My Lai incident, I took my American flag to Central Park, shouted "if our government is going to mistreat the Vietnamese people, we don't need any damned flag," and burned my flag.

Igor: At least you didn't go to prison; that's the beauty of living in a free society.

Ivan: Don't be so sure; although I haven't been imprisoned, I have been sentenced to six months in jail. I'm presently out on bail pending an appeal to the United States Supreme Court.[4]

Igor: How can that be? I always thought that in America you were free to express any idea you wanted to even if the government didn't like it; at least that's what Radio Free Europe said.

Ivan: Well, when the trial judge sentenced me to jail, he said, "Mr. Ivanavitch, I want you to understand the difference between speech and action. In this country, you are free to say what you want to say, but not to do what you want to do." I replied that "I did not hurt anybody by my actions. I did not block traffic or break windows or anything." "Furthermore," I said, "you would not have convicted me if I had been burning my shirt or a piece of paper or something; it's only because of the idea that I conveyed that I'm being punished." The judge then replied: "That is not why I convicted you; you are being punished for creating a potential breach of the peace by insulting your country's flag." Then I said: "But isn't speech supposed to challenge old ideas and get people excited. If someone tries to attack me, shouldn't *he* be arrested? Besides that, nobody did try to attack me or otherwise act unruly, and you know it." Whereupon the judge replied: "Nevertheless, I sentence you to six months in jail."

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[4] On similar facts, the Supreme Court reversed Sidney Street's flag desecration conviction on the ground that he might have been convicted for what he said about the flag rather than for what he did to it. Street v. New York, 394 U.S. 576 (1969). Ivan Ivanavitch, on the other hand, was convicted for his act alone. His words were used only to prove his intent.

The statute under which both Street and Ivanavitch were convicted is N.Y. GEN. BUS. LAW § 136d (McKinney 1968), which authorizes punishment for any person who "[s]hall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act [the American flag]."

Igor: Gosh, that's hard to believe; is there no place on earth where I can find freedom?

Ivan: I have a friend, Johnny Trueblood, a law student, who tells me that in spite of what happened to me, America really is a free country. He thinks that the Supreme Court will reverse my conviction, but that even if it doesn't, this country is still basically free. In fact, this afternoon his Constitutional Law seminar is going to be discussing the constitutionality of punishing flag desecrators, and he has invited me to attend. I'm sure that you will be able to attend also. There's Johnny at the door now.

(Ivan lets Johnny in the door and relates to him his conversation with Igor.)

Johnny Trueblood: Pleased to meet you, Igor; would you like to see some of the sights of New York before class? While we're walking, I'll try to explain the American concept of freedom to you.

Igor: Fine, let's go.

Scene 2

(A street in New York City a few minutes later)

Igor: Hey! There goes a man wearing a flag shirt;[5] let's ask him why he's wearing it.

Johnny Trueblood: Mister, would you be good enough to tell us why you're wearing that flag shirt?

Man: Sure thing, man; I'm wearing this shirt because I hate everything

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[5] Not surprising in view of one clothier's having sold 36,000 flag shirts to retailers across the nation. Time, July 6, 1970, at 8.

America stands for. See the button I'm wearing with it. I got the idea from Abbie Hoffman.

Ivan: It says: "I've wrapped myself in the American flag like all good Fascist pigs."[6]

Johnny Trueblood: Aren't you afraid that you'll be arrested?

Man: Hell man, the fuzz'll pick up a hippie like me for something anyway. I might as well do my thing while I'm out of jail. I better get going; no telling how much longer I'll be free.

Igor: There's another man with a flag shirt.

Johnny Trueblood: Mister, would you be good enough to tell us why you're wearing that shirt?

Second Man: It's groovy, man. Abbie Hoffman wears it and looks groovy.[7] So do Roy Rogers and Dale Evans.[8]

Johnny Trueblood: Did you know you could go to jail for wearing a flag shirt?[9]

Second Man: You've got to be kidding. You mean they send people to jail for looking groovy. Man, somebody sure must be uptight about something. I sure hope they don't send Roy Rogers and Dale Evans to jail. I better get this thing off before a cop sees me.

Igor: Who are Roy Rogers and Dale Evans?

Ivan: They are patriotic movie stars.

Igor: Will they be arrested?

Johnny Trueblood: No.

Igor: That hardly seems fair. Hey! There goes another man with a flag shirt.

Johnny Trueblood: Mister, would you please tell us why you're wearing that shirt?

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[6] See Hoffman v. United States, 256 A.2d 567 (D.C. App. 1969). Hoffman's buttons said "Vote Pig Yippie in Sixty-Eight" and "Wallace for President, Stand Up for America." *Id.* at 568.

[7] *Id.*

[8] See Time, *supra* note 5, at 10.

[9] See Cowgill v. California, 396 U.S. 371 (1970) (per curiam); Hoffman v. United States, 256 A.2d 567 (D.C. App. 1969). Arguably there is a difference between tearing a flag to make a shirt and merely making a shirt to resemble a flag. *Cf.* Long Island Vietnam Moratorium Comm. v. Cahn, 39 U.S.L.W. 2015 (E.D.N.Y. 1970). However, the court in *Hoffman* did not seem concerned with that distinction in that Hoffman's shirt merely "resembled" the flag. *See* 256 A.2d at 570. The New York statute closely resembles the District of Columbia statute. For a summary of all of the flag desecration statutes, see Note, *Flag Burning, Flag Waving and the Law*, 4 Valparaiso U.L. Rev. 345, 362-67 (1970).

THIRD MAN: Certainly, gentlemen, I love my country, I'm proud to be an American, and I want the whole world to know it.[10]

JOHNNY TRUEBLOOD: Aren't you afraid that you'll be arrested for flag desecration?

THIRD MAN: Not a chance. The police know how loyal I am. I'm a veteran, I belong to the American Legion, and I have short hair and no sideburns. War protesters have been arrested for flying the flag upside down as a distress signal, but when the American Legion flew the flag upside down to protest the Pueblo incident, no charges were brought.[11] The police know who the good guys are.

JOHNNY TRUEBLOOD: Does that seem fair to you?

THIRD MAN: Of course it's fair, I'm a patriot; those longhaired hippies don't care about this country. I'd deport them all if it were up to me. Excuse me, please, I'm late for my John Birch society meeting.

JOHNNY TRUEBLOOD: Well, Igor, I don't think you've seen the best side of America so far. Here's an art gallery that sometimes uses flags in its works. Let's go inside.

Scene 3

(Inside the art gallery)

IGOR: Look at that symbolism! Here's an American flag shaped like a human body hanging from a yellow noose, and over there is another one that looks like a penis protruding from a cross.

IVAN: Well, Igor, now you're seeing American freedom in action; Johnny's told me that works of art are protected by the first amendment.[12]

JOHNNY TRUEBLOOD: I hate to say this, fellows, but there is some doubt as to whether *this* art is protected. Stephen Radich, who had an identical display in his art gallery, was convicted of flag desecration. His case is currently before the United States Supreme Court. We'll probably discuss it in class today.[13]

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[10] That patriots as well as protesters wear the flag is apparent from TIME, *supra* note 5, 8-10. See particularly, the picture entitled "Sacramento Flag Day." *Id.* at 10.

[11] *Id.* at 14.

[12] The Supreme Court has indicated that one of the purposes of the first amendment was "the advancement of truth, science, morality and *arts* in general." Roth v. United States, 354 U.S. 476, 484 (1957) (emphasis added), quoting from a letter of the Continental Congress to the inhabitants of Quebec.

[13] People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970); *appeal docketed sub nom.* Radich v. New York, 38 U.S.L.W. 3498 (U.S. May 18, 1970) (No. 1589, 1969 Term; renumbered No. 169, 1970 Term). See note 72 and accompanying text *infra.*

Ivan: How can that be if art is protected?

Johnny Trueblood: Some people think that art ends where flag desecration begins. Hopefully though the Supreme Court will reverse Radich's conviction.

Igor: Here are some pictures of a girl clothed only in an American flag and a pair of boots in various poses with a man who appears to be representing a soldier. Since this is only a picture, I'm sure that he couldn't be convicted.

Johnny Trueblood: I'm afraid you're wrong again; Robert Keough and others were convicted for distributing a publication containing photographs just like these.[14]

Igor: You mean that you can be convicted in this country just for publishing a picture that somebody thinks is disrespectful to the flag.

Johnny Trueblood: Well, that's hard to say; the Supreme Court has never ruled on the question.[15]

Hey, there's my friend Donald Dove. How are you, Donald? I haven't seen you in a while.

Donald Dove: I've been in jail.

Johnny Trueblood: For what?

Donald Dove: I carried an American flag with a peace symbol where the stars belong in a peace parade and was convicted of flag desecration. The judge commended me for carrying the flag in the cause of peace, but felt that he had to convict me under the terms of the statute.[16]

Johnny Trueblood: Sorry to hear about it.

Donald Dove: Well, that's life when you oppose the establishment in America. Did you hear what happened to Tom and Dick. Oh, there they are now.

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[14] People v. Keough, 61 Misc. 2d 762, 305 N.Y.S.2d 961 (Monroe County Ct. 1969).

[15] The Supreme Court has held that a man could be convicted of placing a replica of a flag on the label of his beer bottle in contravention of a state statute prohibiting use of the flag for advertising purposes. However, the first amendment was not discussed in that case. Halter v. Nebraska, 205 U.S. 34 (1907). See discussion at text accompanying notes 48 & 65 *infra*. Compare Long Island Vietnam Moratorium Comm. v. Cahn, 39 U.S.L.W. 2015 (E.D.N.Y. 1970), wherein a three-judge panel held that New York's flag desecretion statute could not be applied against those who wore a button containing a representation of the flag upon which a peace symbol was superimposed.

[16] See complaint in Parker v. Morgan, filed in United States District Court for the Western District of North Carolina, wherein plaintiff describes a similar incident at pp. 5-6.

Johnny Trueblood: How are you guys? Donald's told me something happened to you.

Tom: That's right, we were using an American flag for a beach towel, and some cop arrested us for flag desecration.

Johnny Trueblood: What happened in court?

Dick: The judge sentenced us to thirty days in jail and suspended it on the condition that each of us write a two thousand word theme on "What the Flag Really Means to Me."[17]

Johnny Trueblood: What did you write?

Dick: I wrote that the American flag is worthless except as a beach towel and as something for the establishment to wrap around its lousy cops who pick on anybody who dares to be different.

Johnny Trueblood: What did the judge do?

Dick: You haven't seen me around for the last thirty days, have you?[18]

Johnny Trueblood: What did you write, Tom?

Tom: I wrote that the American flag is the great symbol of liberty for the United States, the greatest society in world history.

Igor: Did you really believe what you wrote?

Tom: Of course not, but I've been free for the past thirty days, if you can call it that.

Johnny Trueblood: Ivan, I think we'd better get Igor out of here; I don't think he's learning much about freedom in the United States.

Ivan: To be very truthful, Johnny, neither am I.

Scene 4

(Back on the street on the way to the law school)

Ivan: Look, there's something we haven't seen today—a flag being flown according to protocol.

Igor: There's somebody coming out of the house; let's ask him why he's flying the flag.

Johnny Trueblood: Sir, would you be good enough to tell us why you're flying the flag?

Man: Certainly, that's my way of saying I love my country and support the President's Southeast Asian policy and the Vice-President's get-tough-on-campus policy. I think that everyone should fly the flag to show his support for these things.

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[17] A similar fate befell Lloyd W. Smith and Michael C. Hemphill who were convicted of flag desecration on similar facts by North Carolina Chief District Judge Gilbert H. Burnett. Raleigh News and Observer, July 16, 1970, at 5, col. 2-4.

[18] In fairness to Judge Burnett, there is nothing in the newspaper article cited above to indicate that the sentence would have been reinstated if the judge had found the content of the themes unsatisfactory.

IVAN: But, suppose somebody doesn't support these things. How does he indicate his opposition?

MAN: A true American would support these things. But if somebody doesn't, he can fly the flag just to show that he's patriotic.

IVAN: But wouldn't that make other people think that he was supporting these other policies.

MAN: So much the better.

JOHNNY: Excuse me, sir; we have to leave now or we'll be late for our seminar.

ACT II

(Seminar room at the law school.[19] Ivan and Igor have been introduced to the professor, who has permitted them to participate in the discussion.)

PROFESSOR: Mr. Wright, do you think that flag desecration is speech?

MR. WRIGHT: Not really, the demonstrator may be showing his general contempt for all that is American, but he is not really saying anything.

MR. LOEFT: I don't agree. If the man is saying I have contempt for America, it seems to me that he's saying a lot.

MR. WRIGHT: I suppose you would argue that a man who assassinated the President of the United States was really "saying a lot."

MR. LOEFT: He might be, but that wouldn't be constitutionally protected speech.

MR. WRIGHT: How do you draw the line?

MR. LOEFT: Basically, I ask whether apart from the idea being communicated, the action has any significance.

PROFESSOR: Would you please explain what you mean by that, Mr. Loeft?

MR. LOEFT: Certainly. The only significance of the flag is what it says. Stripped of its symbolic value, it becomes a cloth that nobody would care about. But it does say something to Americans; thus, those who desecrate it are saying something also. In short, the only reason for flag desecration laws is to protect the sensibilities of Americans who love and cherish everything for which it stands and to punish those who demonstrate by their act of desecration that they do not cherish these same ideals. Obviously there is an interest in preserving the life of the President that transcends communication of an idea. Specifically, the assassin is being punished for what he did to the President and to the country rather than merely for his manifested attitude towards the country.

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[19] No particular law school is intended.

Professor: Do you have any authority?

Mr. Loeft: Yes, in *Tinker v. Des Moines School District*, the Court held that wearing a black armband was "closely akin to 'pure speech.' "[20] The basis of the Court's opinion was the fact that wearing armbands has no significance beyond the idea sought to be conveyed.

Professor: Would it be fair to say that any symbolic act is constitutionally protected so long as the state has no substantial interest in precluding it?

Mr. Quick: Absolutely not. In *United States v. O'Brien* Mr. Chief Justice Warren speaking for the Court said: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[21]

Miss Bright: I disagree with Mr. Quick. Although on the surface his analysis seems impeccable, it is necessary to look behind the Chief Justice's statement to understand what he really meant. The reason for not treating all symbolic acts as "speech" is that frequently they will interfere with an important governmental interest unrelated to suppression; for example, Mr. Wright's illustration of presidential assassination as a means of protest. Thus, to avoid the necessity of apparently "balancing away"[22] freedom of speech, the Chief Justice simply defined symbolic speech out of existence whenever the governmental interest was sufficiently substantial to warrant it.[23] This is apparent from the test devised by Warren: "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct . . . a government regulation [effectively suppressing it] is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[24]

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[20] 393 U.S. 503, 505 (1969).

[21] 391 U.S. 367, 376 (1968).

[22] A phrase frequently employed by Mr. Justice Black. *See, e.g.*, Scales v. United States, 367 U.S. 203, 261 (1961) (dissenting opinion).

[23] This is a popular constitutional approach for those Justices and commentators who do not believe that constitutionally protected speech ought to be balanced against other interests. To avoid that necessity, these Justices and commentators maintain that certain kinds of speech are not entitled to constitutional protection at all. *See, e.g.*, Street v. New York, 394 U.S. 576, 609-10 (1969) (Black, J., dissenting); Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 932 (1963). This process is sometimes denominated "definitional balancing" to distinguish it from "ad hoc balancing" where the Court concedes that constitutionally protected speech is involved but nevertheless balances it against other interests. See Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 Sup. Ct. Rev. 41, 59-61. For an illustration of the dangers inherent in the total rejection of "ad hoc balancing," see Loewy, *Free Speech: The "Missing Link" in the Law of Obscenity*, 16 J. Pub. L. 81, 82-84 (1967).

Mr. Wright: That line of reasoning assumes that the desecrator is saying something in particular by his act. He may just be expressing general contempt as I suggested earlier.[25] On the other hand, he might be protesting a particular governmental act or series of acts such as our guest, Mr. Ivanavitch, was doing. In any event, we do not know exactly what he is trying to say until he tells us with his words, and at that point, the act of flag desecration is unnecessary to convey his idea.[26] Thus, I contend that flag burning has no communicative significance itself.

Ivan: I don't agree with you. As a speaker, I could only convey the feeling that I was disturbed by what our country was doing; I could never convey the intensity of my feelings by mere words—I'm simply not that eloquent.

Mr. Loeft: To paraphrase Mr. Justice Holmes: Flag burning as well as "[e]loquence may set fire to reason."[27]

Mr. Quick: If you are suggesting that flag desecration is particularly effective speech, I cannot agree with you. Nothing turns off the "silent majority," whom I assume you are trying to persuade, quicker than an act of flag desecration.

Ivan: In retrospect, I think that you are correct.

Johnny Trueblood: Mr. Quick's observation may be correct, but it is immaterial. Surely, speech does not have to be persuasive in order to be constitutionally protected.[28] Further, even if flag desecration is ineffective in the sense that it's unpersuasive, it is effective in other ways. In addition to conveying the depth of Ivan's feelings, it enabled him to communicate with far more people than he could have reached via a simple speech. A rich man could buy newspaper space or television time; but Ivan had to do something dramatic or not be heard at all; in essence, flag burning can be a "poor man's printing press."[29]

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[24] United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

[25] See p. 55 *supra*.

[26] This argument was advanced in *Street*. Brief of the Attorney General of the State of New York as Amicus Curiae at 4, Street v. New York, 394 U.S. 576 (1969).

[27] Gitlow v. New York, 268 U.S. 652, 673 (1925) (dissenting opinion).

[28] Indeed, the thrust of the "clear and present" danger test appears to be that the less persuasive certain types of speech (such as that urging violent revolution) are, the more likely they are to receive constitutional protection. Because of this fact, the test ("clear and present danger") has been subject to considerable

On the other hand, I must concede there may be a small category of non-communicative flag desecrators; for example, while walking to class today, we met a man who was wearing a flag shirt just because it looked "groovy." He didn't seem to want to convey anything in particular. Indeed, he claimed to have gotten the idea from both Abbie Hoffman and Roy Rogers.[30]

Mr. Loeft: Nevertheless, he seems to at least be trying to say that the flag ought not to be used exclusively to communicate patriotism: it ought also to be available to wear as a "groovy" shirt.

Mr. Wright: The trouble is that we don't know exactly what he is saying, a fact which buttresses my argument that flag desecration is a very poor means of communication.

Miss Bright: If speech were to lose its constitutional protection simply because the speaker's meaning were unclear, most speech would be unprotected including some United States Supreme Court decisions[31] and some law professors' examinations. However, there is no real point to belaboring this issue in view of *Cowgill v. California*[32] in which the Supreme Court dismissed for want of a substantial federal question an appeal from a conviction of one who was wearing a vest made from an American flag where there was no evidence that the desecrator was trying to communicate anything by his act.[33]

Professor: Of course, the Court has been known to give full consideration to questions that it once deemed insubstantial.[34] Nevertheless, let's

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criticism. *See, e.g.*, Emerson, *supra* note 23, at 910-11. *See generally* Strong, *supra* note 23.

[29] *Cf.* H. Kalven, The Negro and the First Amendment 133 (1965) describing southern protest marches as the "poor man's printing press." *See generally* Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967).

[30] See p. 51 *supra*.

[31] *E.g.*, Roth v. United States, 354 U.S. 476 (1957).

[32] 396 U.S. 371 (1970) (per curiam).

[33] See particularly the concurring opinion of Mr. Justice Harlan (joined by Mr. Justice Brennan) wherein it was noted that appellant presented no evidence "that his conduct conveyed a symbolic message" despite his contention that it did. *Id.* at 372.

[34] Perhaps the most significant illustration is the "compulsory flag salute cases":

confine the remainder of our discussion to those flag desecrators who seek to express an idea by their act of desecration. What interest, if any, does a state have in precluding this? Is coercing patriotism a sufficient interest?

Mr. Wright: I think that it is. However, I contend that "coerce" is too strong a term. The statute merely encourages people to be patriotic, but limits its punishment to those who are affirmatively unpatriotic.

Mr. Loeft: Do you seriously think that there's a difference between coercing patriotic behavior and coercing behavior that is not unpatriotic?

Mr. Wright: I certainly do. In *West Virginia Board of Education v. Barnette*, the Court emphasized that the vice of a board of education resolution requiring a flag salute was "a compulsion of students to declare a belief."[35] Under a flag desecration statute, a person isn't required to declare anything, patriotic or otherwise.

Igor: When the Russian government sentenced me to a Siberian prison camp for burning the Russian flag in Red Square, don't you think that it was trying to coerce me to be patriotic?

Mr. Wright: I suppose *that* government was. It believes in loyalty by coercion.

Johnny Trueblood: Look, Mr. Wright, I'm proud to be an American too, but let's call a spade a spade. If Russia was trying to coerce Igor into being patriotic by sending him to prison for desecrating the Russian flag, how can you deny that New York was doing the same thing when it sentenced Ivan to prison for the same act?

Mr. Wright: Well, in Russia, flag desecration is simply one of many ways to be sent to prison for disloyalty. If Igor had merely stated publicly "my country was unfair to the Czechs," he probably would have been convicted and sent to prison. Ivan, on the other hand, could publicly say "my country was unfair to the Vietnamese" without fear of governmental reprisals.

Mr. Strictman: Furthermore, as a result of *Barnette*, Ivan could not

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Dismissed—Hering v. Board of Educ., 303 U.S. 624 (1938), and Leoles v. Landers, 302 U.S. 656 (1937); Affirmed without opinion—Johnson v. Deerfield, 306 U.S. 621 (1939); *Cert. denied*—Gabrielli v. Knickerbocker, 306 U.S. 621 (1939); Practice held constitutional on merits—Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940); Practice held unconstitutional on merits—West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (discussed pp. 59-60, 78-79 *infra*). See Kurland, *Of Church and State and the Supreme Court*, 29 U. Chi. L. Rev. 1, 27 (1961).

[35] 319 U.S. 624, 631 (1943).

be punished for failure to salute the flag,[36] whereas I suspect that Igor could have been convicted in Russia for failure to salute the Russian flag.

Johnny Trueblood: Assuming the accuracy of those last two observations, you've merely established that Russia has more laws designed to coerce loyalty and conformity than the United States; you have not established that the law prohibiting flag desecration is not designed to coerce loyalty.

Professor: Perhaps we're overly concerned with semantics. I suppose it's fair to say that the purpose of flag desecration statutes is not to coerce loyalty, but to coerce people from affirmatively demonstrating disloyalty. Is that a legitimate state interest?

Miss Bright: Definitely not. Although *Barnette* is factually distinguishable, much of its language suggests that the government has no legitimate interest in punishing demonstrations of disloyalty. For example, the Court said: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ."[37] In *Street v. New York*, Mr. Justice Harlan, after quoting this language, concluded that these freedoms "encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous."[38] Thus, I believe that a mere desire on the part of the government to prevent an affirmative act of disloyalty to the flag is precluded, probably by *Barnette* and certainly by *Street*.[39]

Mr. Wright: If Miss Bright is correct, just how is the government going to prevent disloyalties? I suppose that we'd all agree that a government cannot long endure if a substantial segment of its citizens are disloyal.

Mr. Loeft: You certaintly don't seem to have much confidence in our system of government. We'd be in sad shape if our survival depended on our ability to punish citizens for expressions of disloyalty to the country. What we need to do is not punish expressions of disloyalty but encourage loyalty by manifesting tolerance towards those who dare to be different. When we punish a man such as Ivan for his political protest, we cannot help but nurture whatever feelings of disloyalty he may have and strengthen his feeling that America is unjust. In short, the surest way to promote disloyalty is to enforce a flag desecration statute against those who are already so disillusioned with America that they find it necessary to burn the flag.

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[36] Although those challenging the compulsory flag salute in *Barnette* did so on religious grounds, the Court emphasized that this fact was immaterial: "Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held." 319 U.S. at 634.

[37] *Id.* at 642.

[38] 394 U.S. 576, 593 (1969).

[39] For further development of this argument, see pp. 78-79 *infra*.

MR. WRIGHT: Even if I could agree that punishing expressions of disloyalty per se were not a valid governmental purpose, surely the preservation of our image abroad is important. How does it look to a foreigner when he sees an American burning his own flag?

MR. LOEFT: If he thinks about it, he probably would think that we must have a pretty free society to permit such a thing until he reads about the flag burner being sent to jail. Then he would think that we're not so free after all.

MR. STRICTMAN: I don't agree; if a foreigner sees an American burning his flag, he's going to think that something's wrong in America.

MISS BRIGHT: Maybe there is, after all we're not perfect. I suppose that you'd like the world to think that we are.

JOHNNY TRUEBLOOD: I think that we're asking the wrong question. I'd like the world to think highly of us, but only if we deserve it. It would be no consolation to me to know that the world loves us if that love continues only because we sweep internal dissent under the rug. Beyond that, we're too hung up on our image. Some people say, "Stay in Viet Nam; what will other countries think if we get out?" Others say, "Get out of Viet Nam; what will other countries say if we stay in?" As a result, the merits of the question are frequently obscured. Furthermore, I think that the first amendment has already determined that even if our image abroad were of the utmost importance, it is less important than freedom to dissent. Suppose, for example, thousands of students were to make protest speeches against our government's role in Southeast Asia. The effect of these speeches may well be (or perhaps has been) to lower American prestige in the eyes of some; yet this is scarcely an argument for punishing the speaker or suppressing the speech. Indeed, if such an excuse were available, the government could always suppress dissent for fear of creating a disharmonious image abroad.

MR. WRIGHT: O.k., let's forget foreign images for the moment; what about our boys in Viet Nam? They risk their lives for us every day;

aren't they entitled to more moral support than a headline which reads "American Flag Burned in Central Park to Protest Viet Nam"? Such a headline can scarcely make their sacrifices seem worthwhile.

JOHNNY TRUEBLOOD: I must confess that when I was fighting in Viet Nam, I was incensed by such anti-war demonstrations. Since then, however, I have come to realize that our only reason for fighting was to permit the South Vietnamese to live in freedom. Thus, when I see a man like Ivan being punished for a symbolic expression of dissent, I ask myself whether I should have been fighting for freedom in Southeast Asia when we don't even allow this type of political dissent in the United States. In short, those of us who fought for freedom in a foreign land are done a disservice when the very freedom for which we fought is denied in this country allegedly to protect our morale.[40]

PROFESSOR: Are there any other possible reasons for punishing flag desecrators?

MR. QUICK: In *Street*, Mr. Justice Fortas noted that a state could punish a man for burning his own shirt on a public sidewalk and creating a fire danger even if he were burning the shirt as a protest. He then concluded that "there is no basis for applying a different rule to flag burning."[41]

MISS BRIGHT: That was Mr. Justice Fortas' last free speech opinion and surely one of his worst.[42] Of course, Mr. Street or Mr. Ivanavitch could be punished for violating a generally applicable rule against creating a fire hazard. For example, if New York City had an ordinance which said "Because of the danger of fire and air pollution, it shall be unlawful to burn anything in Central Park," I have no doubt that a man who burned a flag or a shirt (or for that matter a flag shirt) whether to protest something or just for the hell of it could be punished.[43] However, Ivan was not convicted under such a statute. If he had burned his shirt, he would not have been convicted under this statute inasmuch as the statute punishes only flag burning. If there was the slightest evidence that burning flags tends to create more of a fire or pollution danger than burning shirts, the Fortas rationale would be sound. However, no state has even pretended to be predicating its statute on such a ground. Rather, it has picked the American flag as opposed to other chattels to protect from burning solely because of the flag's symbolic significance.

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[40] Compare the reaction of ex-marine James Stern to laws precluding the wearing of flag shirts: "I didn't fight for the flag, I fought for the freedom we were supposedly there to protect. When I come back and try to exercise that freedom, they say you don't have the right." TIME, *supra* note 5, at 15. The article concludes: "He wears a flag shirt anyway."

[41] 394 U.S. at 616 (dissenting opinion).

[42] On the same day, Fortas wrote a dissenting opinion in Watts v. United States, 394 U.S. 705, 712 (1969) (per curiam), a free speech case. However, his dissent was not based on first amendment grounds.

[43] Arguably, the concession made by Miss Bright is not as clear as she suggests. See note *15 infra*, p. 85.

Mr. Quick: Even if the "shirt" analogy is not sound, Justice Fortas went on to explain that "the flag is a special kind of personalty" and that while it "may be property in a sense . . . it is property burdened with peculiar obligations and restrictions."[44] In short, the flag is property "affected with a public interest."[45]

Professor: Do you have any authority for that beyond one Justice's dissenting opinion?

Mr. Quick: Yes, in the landmark case of *Halter v. Nebraska*, the Supreme Court noted that the "representation [of a flag] cannot belong, as property, to an individual."[46] In that case, the Court affirmed the conviction of a man who had placed the representation of an American flag on a beer bottle. Just as Halter owned the bottle, but not the representation of the flag printed thereon, a flag burner may own the cloth with which the flag is made, but he doesn't own the representation of the flag itself.

Mr. Loeft: Who does own it?

Mr. Quick: We all do. Each and every American.

Miss Bright: I have difficulty with this whole line of reasoning. In the first place, I would hardly describe as a "landmark" an obscure 1907 case in which the first amendment was not even mentioned. Secondly, since that statute aimed at advertising,[47] it could be deemed necessary to prevent unfair competition. For example, a prospective purchaser seeing two beer bottles, one with an American flag and one without, might conclude that the beer with the flag on the bottle was supported by the United States government. Thus, to prevent this occurrence, the government can and does forbid the use of the flag in *all* advertising.[48] Similarly, I suppose that the government could limit the use of the flag to official buildings, so that its sole use would be as an identifying trademark. The trouble is that the government has not so limited the use of the flag. It permits, indeed encourages, people to fly it as a sign of support for the government.[49] Because of this permission, the government must also allow it to be used in an unconventional or disrespectful way as a symbol of protest. This conclusion is suggested if not compelled by last term's decision, *Schacht v. United States*,[50] wherein a unanimous Supreme Court reversed an actor's conviction for unauthorized wearing of a military uniform. The Court held that although a statute punishing all unauthorized use of a military uniform would be constitutional, a statute (such as the one at bar) permitting the unauthorized use of such a uniform in a theatrical production "that [did] not 'tend to discredit' the military,"[51] but punishing such use where the theatrical production did tend to discredit the military, was unconstitutional. Thus, if the government permits the flag to be used to credit the country, it also must permit it to be used to discredit the country.

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[44] 394 U.S. at 616, 617 (dissenting opinion).

[45] *Cf.* Munn v. Illinois, 94 U.S. 113, 130 (1876).

[46] 205 U.S. 34, 43 (1907).

[47] At least the segment of the statute under which Halter was convicted was so aimed: "The act, among other things, makes it a misdemeanor, punishable by fine or imprisonment, or both, for anyone to sell, expose for sale, or have in possession for sale, any article of merchandise, upon which shall be printed or placed, for purposes of *advertisement*, a representation of the flag of the United States." *Id.* at 38 (emphasis in original). Another segment of the statute forbids one to "publicly mutilate, deface, defile or defy, trample upon or cast contempt, either by words, or act, upon any such flag . . . ." *Id.* at 37-38 n.1. The Court limited its discussion to the advertising segment of this statute.

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[48] Candor compels the acknowledgment that the Court's rationale in *Halter* was directed more towards the preservation of the flag as a national symbol than the prevention of unfair competition. Nevertheless, Miss Bright's analysis is proper as a means of preserving the *Halter* result under a first amendment challenge. Indeed, one could reasonably contend that laws regulating advertising do not present substantial first amendment questions. See Valentine v. Chrestensen, 316 U.S. 52 (1942).

[49] See 36 U.S.C. § 174(d) (1964):

> The flag should be displayed on all days when the weather permits, especially on New Year's Day, January 1; Inauguration Day, January 20; Lincoln's Birthday, February 12; Washington's Birthday, February 22; Army Day, April 6; Easter Sunday (variable); Mother's Day, second Sunday in May; Memorial Day (half staff until moon), May 30; Flag Day, June 14; Independence Day, July 4; Labor Day, first Monday in September; Constitution Day, September 17; Columbus Day, October 12; Navy Day, October 27; Veterans Day, November 11; Thanksgiving Day, fourth Thursday in November; Christmas Day, December 25; such other days as may be proclaimed by the President of the United States; the birthdays of states (dates of admission); and on State holidays.

Of course, this federal statute is the law in each of the fifty states under the supremacy clause of the United States Constitution. U.S. CONST. art. VI, § 2.

[50] 398 U.S. 58 (1970).

[51] *Id.* at 62, *quoting* 10 U.S.C. § 772(f) (1964).

MR. WRIGHT: O.k., maybe the government doesn't have any interest in insuring only respectful use of its symbols; but what about the citizenry? People who love our great nation are highly offended by wanton acts of flag desecration. Doesn't the average man's sensibilities mean anything anymore?

MR. LOEFT: The Constitution does not permit sensibilities to be protected at the expense of speech. Mr. Justice Harlan emphasized this in *Street* by citing a long line of cases which have established that "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[52]

MR. STRICTMAN: Offensive ideas may be protected, but offensive manners of presentation are not. For example, in *Kovacs v. Cooper*,[53] the Supreme Court affirmed a conviction for using a sound truck to propagate a constitutionally protected message.

MISS BRIGHT: That was justified on the ground of privacy.[54] A man trying to enjoy the privacy of his home has no place to run when a noisy sound truck rumbles past his door.[55] On the other hand, a man offended by an act of flag desecration can simply turn his head and walk the other way.

MR. WRIGHT: What about the man who is offended by one glimpse of a flag being burned?

MR. LOEFT: A free society cannot worry about the sensibilities of people who are so thin-skinned that they become upset by a fleeting glance of an act of protest.

MR. WRIGHT: I suppose that you'd constitutionalize the right to walk through a college campus in the nude to protest a dress code; after all, you only have to look once.

MR. LOEFT: There's quite a distinction; the nude is offensive simply because he is nude, whereas the flag burner is offensive only because of the symbolic significance of his act.

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[52] 394 U.S. at 592. The cases cited were Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Terminiello v. Chicago, 337 U.S. 1 (1949). *Cf.* Cantwell v. Connecticut, 310 U.S. 296 (1940). This position was recently reaffirmed in Bachellar v. Maryland, 397 U.S. 564 (1970). See text p. 79 *infra.*

[53] 336 U.S. 77 (1949).

[54] Whether the particular statute was necessary to protect privacy is a debatable point. *Compare* Mr. Justice Jackson's concurring opinion (*Id.* at 97) *with* Mr. Justice Black's dissent (*Id.* at 98).

[55] After all, he is already in his "castle." *Cf.* Rowan v. Post Office Dept., 397 U.S. 728 (1970); Breard v. Alexandria, 341 U.S. 622 (1951); *but cf.* Martin v. Struthers, 319 U.S. 141 (1943), discussed pp. 75-76 *infra.*

Mr. Wright: That's a distinction without a difference: it's the act and not just the idea that I find offensive. Although I'll admit to being somewhat offended by a man who says "I hate America," I am far more offended by a man who burns his flag while uttering these remarks. Therefore, I contend that, like nudity, flag burning is offensive apart from the idea being conveyed.

Mr. Loeft: Would you be offended by a man who burned his flag because it was no longer fit for use?

Mr. Wright: Of course not; that's how he's supposed to dispose of an unfit flag.[66]

Mr. Loeft: Therefore, your displeasure with the flag burner, unlike the nudist, is at least in part based on the communicative significance of his act.

Mr. Wright: Not at all. There's a time and a place for everything. The man who respectfully burns a flag that is no longer fit for use is acting in accordance with the law. I'm no more offended by that than I am by nudity in the men's locker room. On the other hand, both flag burning and nudity are highly offensive when done publicly.

Mr. Loeft: That may be true, but your tolerance or lack thereof for the nude does not depend on what he is trying to convey. Contrawise, your intolerance for the public flag burner is based upon the disrespect he is showing towards our country which I contend is too closely tied to the idea he is trying to convey to serve as constitutional justification for the prohibition.[67]

Professor: Assuming that Mr. Loeft is correct, couldn't we punish a man who desecrates the flag in public on the "fighting words" rationale of *Chaplinsky v. New Hampshire*?[68]

Mr. Strictman: Chief Judge Fuld speaking for a unanimous New York Court of Appeals in *Street* thought so. Citing *Chaplinsky*, he described Sidney Street's act of flag burning as "literally and figuratively 'incendiary' and as fraught with danger to the public peace as if he had stood on the street corner shouting epithets at passing pedestrians."[69]

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[66] 36 U.S.C. § 176(j) (1964).

[67] For further development of this issue, see 79-80 *infra*.

[68] 315 U.S. 568 (1942).

[69] 20 N.Y.2d 231, 237, 229 N.E.2d 187, 191, 282 N.Y.S.2d 491, 496 (1967).

Johnny Trueblood: That reasoning troubles me. If the "fighting words" rationale can justify punishment whenever something is communicated by some word or symbolic act that most people find unacceptable, the first amendment would be limited to protecting politically acceptable speech, which scarcely needs protection. I would agree with the Court of Appeals for the District of Columbia Circuit which held that the "fighting words" must be actually likely to cause a breach of the peace.[60] That was not true in Street's case[61] inasmuch as he was acquitted of disorderly conduct, and it was certainly not true in Ivan's case.

Mr. Wright: They're lucky that I wasn't there. I'd have beaten their brains out.

Mr. Loeft: That's a pretty violent way to react to an act which you described as "not really saying anything."[62]

Mr. Wright: He was insulting my country in an offensive manner. Indeed, if I had seen him burn the flag, I'd have been far more offended than I would have been had he personally called me "a damned racketeer and a damned Fascist."[63] Furthermore, most patriotic Americans would rather be insulted themselves than have their flag desecrated. This love of country over self is embodied in such immortal remarks as John Kennedy's "ask not what your country can do for you; ask what you can do for your country."[64]

Mr. Loeft: I doubt that President Kennedy meant for you to beat Ivan's brains out.

Mr. Wright: Be that as it may, a Street or an Ivanavitch who desecrates our sacred American flag is inviting retaliation even more than a Chaplinsky who insults a town official. That's why in *Halter v. Nebraska*, the Supreme Court said:

> For that flag every true American has not simply an appreciation but a deep affection. No American, nor any foreign born person who enjoys

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[60] Williams v. District of Columbia, 419 F.2d 638 (D.C. Cir. 1969).

[61] Street v. New York, 394 U.S. 576 (1969), discussed pp. 60, 65 *supra*; pp. 78-79 *infra*.

[62] P. 55 *supra*.

[63] The epithets delivered by Chaplinsky, 315 U.S. at 569. The complaint charged Chaplinsky with calling the town official "a Goddamned racketeer and a damned Fascist," but Chaplinsky denied that he had employed the name of the Diety. *Id.* at 570.

[64] J.F. Kennedy, *Inaugural Address* in PUBLIC PAPERS OF THE PRESIDENTS 3 (1961).

the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free government. Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.[65]

Even so libertarian a writer as Zechariah Chafee has said: "The man who talks scurrilously about the flag commits a crime, not because the implications of his ideas tend to weaken the Federal Government, but because the effect resembles that of an injurious act such as trampling on the flag, which would be a public nuisance and a breach of the peace."[66]

MISS BRIGHT: The Supreme Court unequivocally rejected the Chafee rationale for punishing scurrilous talk about the flag when it said of Street's verbal insult to the flag: "Though it is conceivable that some listeners might have been moved to retaliate upon hearing appellant's disrespectful words, we cannot say that appellant's remarks were so inherently inflammatory as to come within the *small class* of 'fighting words' which are 'likely to provoke the average person to retaliation and thereby cause a breach of the peace.' "[67]

MR. STRICTMAN: That may be true of mere words, but surely the act of burning the flag is indeed figuratively as well as literally incendiary.

MISS BRIGHT: Even if I were to assume that certain kinds of flag desecration under certain circumstances, such as burning a flag in front of someone who had just manifested sentiments similar to those manifested by Mr. Wright a moment ago, would constitute "fighting words,"[68] the statutes punishing flag desecration are not so limited.[69] For example, as Mr. Trueblood has noted, both Street and Ivan were convicted even though there was no evidence of breach of the peace.[70] The Supreme Court in *Street* also noted that "even if appellant's words might be found within that category (fighting words), [the statute] is not narrowly drawn to punish only words of that character, and there is no indication that it was so interpreted by the state courts."[71] Since *Street*, the New York Court of Appeals has construed its flag desecration statute to apply to an art dealer who used the flag for "protest art" in his art gallery, notwithstanding a lack of evidence of physical violence.[72] Inasmuch as the Supreme Court has held that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved,"[73] I contend that nobody can be punished under a flag desecration statute unless that statute is construed to apply only to those acts of flag desecration which in fact are likely to produce a breach of the peace.[74]

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[65] 205 U.S. at 41.

[66] Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 150 (1941).

[67] 394 U.S. at 592, quoting from *Chaplinsky*, 315 U.S. at 574 (emphasis added).

[68] "If you burn that flag, I'll beat your brains out."

[69] Even there, it is at least arguable that a man ought not to lose his first amendment rights because of hostility on the part of his addressees. *Cf.* Cooper v. Aaron, 358 U.S. 1 (1958); *but see* Feiner v. New York, 340 U.S. 315 (1951). Both cases are discussed pp. 80-83 *infra*.

[70] Text accompanying notes 60 & 61 *supra*.

Mr. Wright: If all else fails, I'd punish the flag desecrator for inciting a revolution against the government.

Mr. Loeft: How can you attribute so much clarity of thought to a flag burner, when you've indicated that frequently "we don't know exactly what he is saying"?[75] Furthermore, even if some flag burners are signaling a call to revolution, others, such as Ivan, are not. Thus, to justify convicting flag burners for this reason, the statute would also have to be narrowly drawn.[76]

Professor: We're running short of time. Are there any constitutional reasons other than free speech for not punishing flag desecrators?

Johnny Trueblood: I think that these statutes are both unconstitutionally vague and a denial of equal protection. For example, the New York statute forbids one to "cast contempt . . . upon the flag."[77] Does this mean only a cloth flag or any representation of a flag? Does one cast contempt upon a flag if he puts a peace symbol where the stars should be or if he flys it upside down as a distress symbol? Because of this inherent vagueness, the statute lends itself to discriminatory enforcement and hence a denial of equal protection.[78] We saw several illustrations of such discrimination on the way to school today.[79]

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[71] 394 U.S. at 592.

[72] People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970); *appeal docketed sub nom.* Radich v. New York, 38 U.S.L.W. 3498 (U.S. May 18, 1970) (No. 1589, 1969 Term; renumbered No. 169, 1970 Term). See pp. 52-53 *supra*.

[73] Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[74] For further analysis of this issue, see pp. 80-84 *infra*.

[75] See p. 58 *supra*.

[76] For further analysis of this issue, see pp. 84-85 *infra*.

[77] N.Y. Gen. Bus. Law § 136d (McKinney 1968).

[78] *Cf.* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[79] Act I, Scenes 2, 3 & 4 *supra*. Perhaps Long Island Vietnam Moratorium

MR. STRICTMAN: Mere unequal enforcement of a statute does not constitute a denial of equal protection. One seeking to challenge a statute on this ground must prove systematic discrimination against an individual or group.[80]

JOHNNY TRUEBLOOD: I am not suggesting that this is a valid statute which has been discriminatorily applied. Rather, I contend that the infirmity is the inherent vagueness of the statute itself. The Supreme Court has consistently held that where a statute gives a public official discretion as to what speech to allow and what not to allow, it cannot stand.[81]

MR. STRICTMAN: I can't see that flag desecration statutes are particularly vague. While it is true that there will be some close cases, this is true under any statute. As Mr. Justice Holmes said, "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or short imprisonment, as here; he may incur the penalty of death."[82] A marginal flag desecrator knows that he's taking his chances.

JOHNNY TRUEBLOOD: That's fine, so long as you're talking about ordinary criminal statutes; there the actor takes his chances. However, where the first amendment is involved, the Supreme Court has told us that "[t]he objectionable quality of vagueness and overbreadth does not depend upon the absence of fair notice to a criminally accused . . . , but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application."[83]

PROFESSOR: Are there any other possible constitutional objections to flag desecration statutes?

MR. LOEFT: Yes, I think that they establish a religion. The very word "desecrate" means "to divest of sacred or hallowed character."[84] That sounds mighty religious to me.

MR. WRIGHT: In the first place, some of the statutes don't even use the

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Comm. v. Cahn, 39 U.S.L.W. 2015 (E.D.N.Y. 1970), cited note 15 *supra* will ameliorate some of the more egregious instances of selective enforcement.

[80] Snowden v. Hughes, 321 U.S. 1, 8 (1944).

[81] *See, e.g.*, Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[82] Nash v. United States, 229 U.S. 373, 377 (1913).

[83] NAACP v. Button, 371 U.S. 415, 432-33 (1963). See also Winters v. New York, 333 U.S. 507 (1948).

[84] AMERICAN COLLEGE DICTIONARY 327 (1953).

term "desecrate."[85] Secondly, we should look at what the statute does, not what it says.

Mr. Loeft: For once I agree with you. The proper question is indeed what does the statute do, and these statutes preclude a manifestation of disrespect for a symbol, thereby protecting the flag in the same manner as ecclesiastical laws protect against the desecration of sacred symbols. I think that the *Joseph Burstyn* case[86] in which the Court held that sacrilegious movies could not be denied constitutional protection should rule this case.

Mr. Wright: That case didn't hold that any remark, regardless of how offensive to religion, was constitutionally protected. However, even if I were to agree with a recent Columbia Law Review note which suggests that traditional laws against blasphemy are unconstitutional,[87] it would not follow that a law protecting a sacred secular symbol is unconstitutional.

Mr. Loeft: In *Engle v. Vitale*, the Court said that "each separate government in this country should stay out of the business of writing or sanctioning official prayers [in that case a non-sectarian one]."[88] I say that each separate government should stay out of the business of creating quasi-religious sacred symbols.

Professor: That's certainly a novel approach, Mr. Loeft, but I doubt that the Court will adopt it. It chose to rely on freedom of speech rather than religion in both the *Burstyn* case, which you've cited, and *Barnette*.[89] Therefore, if the Court would uphold flag desecration laws against the other arguments advanced, I doubt that the religion clauses would compel a contrary result. In any event, we've reached the end of the hour; class dismissed.

ACT III

Scene 1

(Outside of the United States Supreme Court Building, several months later)

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[85] *E.g.*, N.Y. Gen. Bus. Law § 136 (McKinney 1968).

[86] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

[87] Note, *Blasphemy*, 70 Colum. L. Rev. 694, 733 (1970). The author's conclusion appears to be based more upon freedom of speech than nonestablishment of religion. See note 89 *infra* and accompanying text.

[88] 370 U.S. 421, 435 (1962).

[89] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), discussed pp. 59-60 *supra* and pp. 78-79 *infra*.

Present: Ivan, Igor and Johnny

Ivan: I'm really scared; what will I do if the Supreme Court affirms my conviction?

Igor: Don't worry, Ivan, I'll take care of your apartment while you're in prison. After that we can try to find a truly free society in which to live.

Johnny Trueblood: Now don't start talking that way; this is a great nation even if it does occasionally make mistakes. I fully believe that the Court will reverse your conviction, but even if it doesn't, you'd be very foolish to leave the country.

Igor: I'm not so sure of that. Remember your classmate who threatened to beat Ivan's brains out. If one has to choose between expressing dissent and preserving his brains, I question how great this nation is.

Johnny Trueblood: Mr. Wright just got carried away emotionally; I wouldn't take him seriously.

Ivan: Well, he certainly had some case law to back him up. If the "fighting words" rationale of *Chaplinsky* is combined with the "love of flag" rationale of *Halter*, I could be in real trouble, and in view of the four man dissent in *Street* and the dismissal for want of a substantial question in *Cowgill*, I'm scared to death.[90]

Johnny Trueblood: Let's go inside; I think they 're ready to announce their decisions. Let's hope they decide your case today and declare you a free man.

Scene 2

(Inside the Supreme Court, a few minutes later. The Court is about to announce its decision in Ivanavitch v. New York.)

Opinion of the Court:[91]

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[90] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), discussed pp. 66-69 *supra* and pp. 80-84 *infra*; Halter v. Nebraska, 205 U.S. 34 (1907), discussed pp. 67-68 *supra* and p. 78 *infra*; Street v. New York, 394 U.S. 576 (1969), discussed throughout; Cowgill v. California, 396 U.S. 371 (1970), discussed p. 58 *supra* & p. 74 *infra*.

[91] The opinion about to be presented is not being attributed to any particular Justice. However, the author believes that it is not inconsistent with the general philosophy of any Justice presently sitting on the Court (Mr. Justice Blackmun excepted because he has not been on the Court long enough for the author to form an opinion of his first amendment philosophy). Although in *Street* Mr. Justice White appeared to reject the result about to be suggested, he refrained from giving any reasons. 394 U.S. at 515 (dissenting opinion). To the author's knowledge, the Justice has never articulated a philosophy opposed to that espoused by the opinion about to be presented. Mr. Justice Black also dissented in *Street*. However, his

The case before us presents questions that strike at the heart of the proper role of government in a society that is truly committed to freedom of speech as a living principle. On the one side, we have a young naturalized citizen of this great nation, who became so disillusioned with some of our actions in Viet Nam that he found it necessary to register a protest that would be heard. Being unknown and non-flamboyant as a speaker, he concluded that the only way to attract attention was to burn the American flag as part of his protest. On the other side, we have the State of New York which seeks to vindicate the majesty of the flag and protect the sensibilities of its citizens who love it.

The facts are not disputed. Appellant, Ivan Ivanavitch, who had been skeptical of our involvement in Viet Nam for some time, heard of the My Lai massacre on the evening news. Shortly thereafter, he took his American flag (which he had proudly purchased upon becoming a naturalized citizen) and walked to Central Park, determined to be heard. Upon arriving at the park, he shouted, "If our government is going to mistreat the Vietnamese people, we don't need any damned flag!" and simultaneously burned his flag. Unfortunately for Ivanavitch, the act did not attract nearly the attention for which he had hoped. Indeed, there is no evidence that anybody even stopped to think about what he was doing, that is, anybody except a New York City policeman, who observed the act and immediately arrested appellant for violating New York General Business Law § 136d which forbids one to "publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act [the American flag]."[1] Appellant was convicted by the New York Supreme Court. The conviction was affirmed per curiam by both the Appellate Division of the Supreme Court and the New York Court of Appeals. We noted probable jurisdiction.

This is the second conviction under this statute to reach our Court. In *Street v. New York*, 394 U.S. 576 (1969), we held the "words" provision of § 136d to be unconstitutional. We e[illegible]ft open the

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[1] Although the term "American flag" is not mentio[illegible]hat section of the statute, there is no doubt that it is the American flag to which the prohibition refers.

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rationale appears to be inconsistent with the philosophy he has espoused in other first amendment cases. 394 U.S. at 610. See pp. 75-76 *infra*.

Although the opinion attributes certain arguments to the State of New York, the author is not implying that New York or any of its attorneys either have or are likely to make any particular argument.

Henceforth, Court footnotes will be numbered in italics while the author's footnotes will continue to be numbered in roman face type.

question of whether a conviction based on the act of burning a flag alone would be constitutionally permissible where applied to a defendant whose act of burning was performed as a political protest. Again last term in *Cowgill v. California*, 396 U.S. 371 (1970), we left that question open when we dismissed for want of a substantial federal question an appeal from a man who was convicted of wearing a flag vest for no apparent political reason. Thus, for the first time, we are squarely faced with the task of deciding whether flag desecration laws can be employed to stifle this highly emotional form of political dissent.[8]

Appellant argues that § 136d (1) denies freedom of speech, (2) denies equal protection, (3) is unconstitutionally vague, and (4) constitutes an establishment of religion. Because we agree with appellant's first contention, it is unnecessary to consider the remaining three.

Appellee vigorously contends that appellant's act of wanton disrespect is not speech within any accepted meaning of the term and that even if it were, the state's interests are sufficient to outweigh any limited free speech interest that appellant might have. Each of these arguments will be considered separately.

I

Of course, it is far too late to argue that ideas communicated nonverbally are for that reason alone not entitled to constitutional protection. Any such narrow reading of the First Amendment was negatived at least as early as *Stromberg v. California*, 283 U.S. 359 (1931), wherein this Court held that a conviction for public display of a red flag "as a sign, symbol or emblem of opposition to organized government" could not stand consistently with the freedom of speech protected by the Fourteenth Amendment.[9] *Stromberg* was followed in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), wherein this Court struck down a board of education resolution requiring students to salute the flag.[92]

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[8] There is no unanimity among lower federal courts on this question. *Compare* Hodsdon v. Buckson, 310 F. Supp. 528 (D. Del. 1970) (unconstitutional) *with* United States v. Ferguson, 302 F. Supp. 1111 (N.D. Cal. 1969) (constitutional).

[9] When *Stromberg* was decided, the first amendment had not been definitely incorporated into the fourteenth amendment as such. Three Justices presently on this Court continue to maintain that the protection offered by the two amendments is not necessarily coterminous. [The Chief Justice, Mr. Justice Harlan, and Mr. Justice Blackmun—see Hoyt v. Minnesota, 399 U.S. 524 (1970) (Blackmun, J., dissenting)]. By our use of the term "first amendment" throughout the remainder of this opinion, we mean only so much of the first amendment as each individual Justice thinks is incorporated into the fourteenth.

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[92] *See* pp. 59-60 *supra* & pp. 78-79 *infra*.

More recently, we sustained the right of school children to wear black armbands to school as a protest against the Viet Nam conflict, *Tinker v. Des Moines School District*, 393 U.S. 504 (1969). Finally, just last term, we unanimously reversed the conviction of a young actor for unauthorized use of a military uniform where the basis of his conviction was the play's tendency to discredit the military. *Schacht v. United States*, 398 U.S. 58 (1970).

Recognizing that non-verbal methods of communication are sometimes entitled to constitutional protection, New York argues the true test for ascertaining what is "speech" is whether the conduct contravenes a valid criminal statute. *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 498 (1949). It further contends that the general validity of flag desecration statutes has been established by *Halter v. Nebraska*, 205 U.S. 34 (1907), and *Cowgill v. California, supra.* Although there is language in Mr. Justice Black's dissenting opinion in *Street v. New York, supra*, to suggest that the test suggested by New York is the proper one to apply to the question at bar, we believe that such a test would constitute a significant departure from our traditional approach in First Amendment cases.

Specifically, Mr. Justice Black said, "It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense. . . . 'It rarely has been suggested that the constitutional freedom for speech and press extends to immunity for speech or writing used as an integral part of conduct in violation of a valid criminal statute.' " 394 U.S. at 610 (quoting from *Giboney*, 336 U.S. at 498). Reduced to a syllogism, the position appears to be as follows: major premise—First Amendment considerations are irrelevant if the statute is otherwise valid; minor premise—the statute is valid apart from First Amendment considerations; conclusion—therefore the statute, being valid apart from the First Amendment, is valid in spite of the First Amendment.

This Court has consistently rejected the major premise of that syllogism. For example, in *Martin v. Struthers*, 319 U.S. 141 (1943), we reversed the conviction of a woman who was distributing religious literature in contravention of an ordinance which provided: "It is unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circular or other advertisements they or any person with them may be distributing." Although conceding that the ordinance was reasonably related to preventing both nuisances and criminal activity and that it could be applied constitutionally to commercial advertising,[4] the Court concluded that the municipality's interest in applying the statute to appellant was not sufficiently great to outweigh her free speech interest. Indeed, even *Giboney* recognized the special protection to which the First Amendment is entitled: "In holding this [that the particular conduct was not protected by the First Amendment], we are mindful of the essential importance to our society of a vigilant protection of freedom of speech and press. *Bridges v. California*, 314 U.S. 252, 263 (1941). States cannot consistently with our Constitution abridge those freedoms to obviate slight inconveniences or annoyances. *Schneider v. State*, 308 U.S. 147, 162 (1939). But placards used as an essential and inseparable part of a *grave offense against an important public law* cannot immunize that conduct." 336 U.S. at 501-02 (emphasis added). Thus, in holding that the "preferred position"[5] of the First Amendment requires the state to establish more than the general validity of the law, we do not break new ground, but simply follow our own well established precedents.[93]

Nevertheless, as we held in *Cox v. Louisiana*, 379 U.S. 536, 555 (1965), "the First and Fourteenth Amendments [do not] afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." Although the dichotomy suggested by *Cox* has been criticized,[6]

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[4] That we thought that the statute in *Martin* could be applied to commercial advertising was apparent from footnote 1 wherein we noted that "this ordinance was not aimed solely at commercial advertising" and cited Valentine v. Chrestensen, 316 U.S. 52 (1942), which held that commercial advertising is not entitled to the same constitutional protection as noncommercial speech. *Cf.* Breard v. Alexandria, 341 U.S. 622 (1951).

[5] A phrase frequently employed by this Court to describe the status of the first amendment.

[6] *E.g.*, Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 23: "The Court's neat dichotomy of 'speech pure' and 'speech plus' will not work. . . . To begin with, I would suggest that all speech is necessarily 'speech plus.' If it is oral, it is noise and may interrupt someone else; if it is written, it may be litter."

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[93] Apart from his dissent in *Street*, Mr. Justice Black has consistently adhered to these precedents; he authored *Martin* and *Giboney*. Indeed, he went farther than the Court in Breard v. Alexandria, 341 U.S. 622 (1951), in which the Court, over his dissent, refused to apply *Martin* to a door-to-door magazine salesman.

we are willing to assume that the dichotomy is a real one and that flag desecration constitutes "speech plus."

Of course, this conclusion does not resolve the issue; it merely presents it. We still must determine what interest on the part of the state will be sufficient to justify appellant's conviction.[24] New York suggests that the appropriate test is that devised in *United States v. O'Brien*, 391 U.S. 367, 377, wherein this Court held that "a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Appellant argues that the *O'Brien* test ought not to apply: first, because his act of flag burning like the wearing of armbands in *Tinker v. Des Moines School District, supra*, was "closely akin to 'pure speech,'" 393 U.S. at 505,[7] and, second, because *O'Brien* was more restrictive in the protection granted First Amendment rights than any other modern First Amendment decision.[8] Although there is considerable force in these arguments, we have decided to apply the *O'Brien* tests as the touchstone for First Amendment protection in this case. We now turn to an analysis of the reasons proffered by the state to justify this conviction.

II

New York contends that it has at least four interests sufficient to justify this limitation on symbolic speech: (1) insuring proper respect for the flag, (2) protecting the sensibilities of its citizenry, (3) preventing

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[7] The basis of this argument is that flags, like armbands, have no value apart from their symbolic significance. Draft cards, on the other hand, are reasonably related to the smooth functioning of the selective service system.

[8] Those who have criticized *O'Brien* have objected more to the application of the test than to the test itself. Specifically, questions have been raised as to the importance or substantiality of the aid to the smooth functioning of the selective service system provided by the statute when contrasted to the interference with free speech engendered thereby. *Compare* Martin v. Struthers, *supra*, *with* Giboney v. Empire Storage and Ice Co., *supra*. *See, e.g.*, Alfange, *Free Speech and Symbolic Conduct: The Draft Card Burning Case*, 1968 SUP. CT. REV. 1, 23; Loewy, *The Warren Court as Defender of State and Federal Criminal Laws: A Reply to Those Who Believe That the Supreme Court Is Oblivious to the Needs of Law Enforcement*, 37 GEO. WASH. L. REV. 1218, 1227 (1969).

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[24] It does not matter whether we call this process "ad hoc balancing," "definitional balancing," or something else; it is a process in which the Court must engage since it is apparent that some methods of communication are constitutionally protected, whereas others are not. See note 23 & accompanying text *supra*.

breaches of the peace, and (4) preventing a violent revolution or attempted revolution. We consider them seriatum.

First: Appellee strenuously urges that at least since *Halter v. Nebraska, supra,* it has been the prerogative of a state to pass laws insuring proper respect for our nation's flag. However, in view of the Court's failure to even discuss the First Amendment in that 1907 case, we do not view it as controlling. More recently, in *West Virginia Board of Education v. Barnette, supra,* this Court in holding a compulsory flag salute unconstitutional said, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. at 642. We echoed those sentiments in *Street v. New York, supra,* where we held that " 'the freedom to be intellectually . . . diverse or even contrary, and the right to differ as to things that touch the heart of the existing order' encompass the freedom to express publicly one's opinion about our flag, including those opinions that are defiant or contemptuous." 394 U.S. at 593, quoting from *Barnette.*

Appellee recognizes the relevance of these cases, but argues that they are distinguishable. It would distinguish *Barnette* on the ground that that case dealt with a particular method of demonstrating respect—the salute. Thus, it would read *Barnette* as holding that a state cannot require an individual to show respect in any particular way so long as he is in fact respectful, but that it can punish him for an affirmative act of disrespect. Of course, much of this argument has been undercut by *Street.* In recognition of this fact, appellee argues that *Street* should be limited to "pure speech." Thus, the appellee would have us glean the following rules from *Barnette* and *Street*: No man can be punished for failure to affirmatively demonstrate respect for the flag in any particular way; nor can anyone be punished for speaking contemptuously of the flag; but a man who casts contempt upon the flag by an act such as burning can be punished.

We concede that if we were bent on minimizing the First Amendment protections developed by these cases, it would be possible to read them as restrictively as appellee suggests. However, to do so would be to preserve the body shell of the decisions on the one hand while tearing out their heart on the other. This we cannot and will not do. We believe that the heart of Mr. Justice Jackson's great *Barnette* opinion was this simple but classic statement: "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricities and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." 319 U.S. at 641-642.

We agree with our late brother Jackson that how one respects the flag does not matter much. On the other hand, one who burns the flag is perhaps saying things that indeed "touch the heart of the existing order." Yet, as *Barnette* reminds us, it is precisely this kind of speech which needs constitutional protection. Therefore, we hold that New York's desire to insure proper respect for the flag is not sufficient to justify this conviction.

Second: Appellee urges that flag desecration laws are necessary to protect the sensibilities of its citizenry. Applying the *O'Brien* test, we assume *arguendo* that this "is within the constitutional power of the government" and that "it furthers an important or substantial governmental interest." However, we do not agree that "the governmental interest is unrelated to free speech."

New York concedes as it must in view of a long line of cases culminating in *Street*[9] that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." 394 U.S. at 592. Indeed, any other rule would destroy a primary purpose of the First Amendment. As we said in *Terminiello v. Chicago*: "(A) function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." 337 U.S. 1, 4 (1949).

Nevertheless, the state contends that it can protect people's sensibilities from an offensive manner of presenting ideas so long as it is neutral as to content. For example, it argues that it can punish one for wearing a shirt which says "(four letter obscenity) the draft" so long as it is prepared to punish one who would wear a shirt saying "(four letter obscenity) the draft resister." We accept the state's contention *arguendo*, but hold that it is inapplicable here because § 136d is not neutral as to content. To illustrate, the average New Yorker would not be offended by the burning of an ordinary piece of cloth. Indeed, if the cloth were colored to represent the Viet Cong flag, he would probably be delighted to see it burn. His reason for not being happy or neutral when the American flag is burned is that the flag burner is effectively saying "I do not share your views as to the sacredness of the American flag." If further proof were needed that flag burning is not inherently offensive, we need only look to 36 U.S.C. § 176(j) which provides as follows: "The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, *preferably by burning*" (emphasis added). Thus, we conclude that the governmental interest in protecting the sensibilities of its citizens is not sufficiently unrelated to speech to qualify under *O'Brien*.

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[9] The long line of cases include Terminiello v. Chicago, 337 U.S. 1 (1949), Edwards v. South Carolina, 372 U.S. 229 (1963), and Cox v. Louisiana, 379 U.S. 536 (1965). Just last term we reaffirmed this position. Bachellar v. Maryland, 397 U.S. 564 (1970).

Third: Appellee, relying on *Feiner v. New York*, 340 U.S. 315 (1951), and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), argues that § 136d is necessary to prevent breaches of the peace. Applying the *O'Brien* criteria to this interest, nobody would gainsay that preventing breaches of the peace "is within the constitutional power of the government" and "furthers an important or substantial governmental interest." Ivanavitch, however, argues that where the unpalatability of the message is the cause of the potential breach of peace, "the governmental interest is [not] unrelated to the suppression of free expression." New York, on the other hand, contends that since it is concerned with the potential reaction of the crowd rather than the content of the speech, its interest is unrelated to the First Amendment. We find it unnecessary to resolve this question since we have determined that the fourth *O'Brien* criterion has not been met in that this "restriction on . . . First Amendment freedoms is . . . greater than is essential to the furtherance of [the State] interest."

We base this conclusion on the simple, and obvious, fact that this statute is not limited to those acts of flag desecration which are in fact likely to produce a breach of the peace.[10] *Feiner v. New York, supra*, cited by appellee, is an instructive case in point. There, the police arrested a speaker for disorderly conduct only after he had been speaking for several minutes and warned to stop after a large restless crowd had gathered which the police believed they could not adequately handle. Even there, the Court was sharply divided and included a dissent which described the decision as "a dark day for civil liberties in our nation" and "a long step toward totalitarian authority." 340 U.S. at 323. The dissent contended that the police should have attempted to quiet the crowd or arrest the man who threatened the speaker (dissenting opinion of Black, J.). But whether *Feiner* was correctly decided or was "a long step toward totalitarian authority," we will not extend it beyond its facts. Rather, we will continue to insist that when a state wishes to prevent breaches of the peace, it must not suppress speech at least until it appears likely that the speech is going to cause a breach of the peace. This is not a novel concept. For years, this Court has looked askance at statutes which burden free speech with a ten-ton weight when a ten-pound weight will adequately protect whatever interest the state may have.[11] The reason that this Court has maintained such an attitude is that First Amendment rights are too precious to sport away unnecessarily. Thus, a state which can satisfy its interests without interfering with freedom of speech is not justified in asking this Court to sanction its decision to interfere anyway.

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[10] *See, e.g.*, People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970); *appeal docketed sub nom.* Radich v. New York, 38 U.S.L.W. 3498 (U.S. May 18, 1970) (No. 1589, 1969 Term; renumbered No. 169, 1970 Term).

New York, however, argues that under *Chaplinsky v. New Hampshire, supra*, so long as appellant's act was substantially akin to "fighting words," the conviction should be sustained even though in fact there was no violence or threat of violence. The state notes that we affirmed Chaplinsky's conviction for calling a town official "a damned racketeer and a damned Fascist" even though there was no evidence of actual violence on the part of the addressee, nor did any breach of the peace transpire.[12] In affirming the conviction, we said: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." 315 U.S. at 571-572. It will be observed that there were at least three different reasons suggested for holding Chaplinsky's "fighting words" to be unprotected: (1) they "inflict injury," (2) they "tend to create a breach of the peace," and (3) they "are no essential part of the exposition of ideas." We will consider these reasons in inverse order.

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[11] Although the term "overbreadth" has been used in our free speech cases only since the 1960s; the concept is considerably older than that. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88 (1940).

[12] Apparently, a riot did transpire, ostensibly because of Chaplinsky's comments to the local citizenry regarding religion. However, the insultee was not one of the rioters, and the fact of the riot was immaterial to his conviction.

Appellant urges us to limit *Chaplinsky* to those utterances which "are no essential part of the exposition of ideas." In so urging, he contends that if Yetta Stromberg's display of a red flag (Stromberg v. California, *supra*) and Mary Beth Tinker's wearing of a black armband (Tinker v. Des Moines School District, *supra*) were each an essential part of the exposition of an idea, then his, Ivan Ivanavitch's, burning of an American flag should be accorded like significance. We agree with appellant that unless we overrule *Stromberg* and *Tinker* (which we have no intention of doing), we must find that his burning of the flag was an essential part of the exposition of an idea.[19] Nevertheless, we cannot distinguish *Chaplinsky* on that ground because we do not believe that defendant's failure to expound an idea was really the basis of *Chaplinsky*. Specifically, we do not agree that Chaplinsky's statement to the town official was something other than the expression of an idea. He wished to inform the town official of his opinion of him and did so in a way which was not only unquestionably clear, but was all too clear; indeed, that was the whole trouble. Thus, we turn to the "tend-to-create-a-breach-of-the-peace" rationale.

New York strenuously urges that Ivanavitch's act of flag desecration was more likely to provoke a violent reaction than Chaplinsky's "fighting words." Although conceding that the act did not in fact cause a breach of the peace, the state reminds us that that was also true of Chaplinsky's so-called "fighting words." We are also told that the average patriotic American citizen would be more provoked and more likely to retaliate against one who subjects his country's flag to the ultimate insult than he would against one who merely personally insults him. Ivanavitch counters this by noting that since *all* people are likely to be upset by a personal insult whereas only *some* people are upset by flag desecration, that the state cannot punish all flag desecrators in the same manner that it punishes all those who employ "fighting words" in face-to-face discussion, but can punish only those desecrators who in fact create a "clear and present danger" of violence.[95]

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[19] Appellee would distinguish *Stromberg* and *Tinker* on the ground that the act of flag desecration communicates nothing in particular unless and until it is verbally explained. We find that distinction illusory inasmuch as all symbolic acts must be explained to be meaningful. For example, wearing a black armband would be meaningless unless at some point somebody had explained that it was designed as a protest against our involvement in Viet Nam.

We conclude that unless we adopt appellant's interpretation of *Chaplinsky*, we would invite the speedy demise of the First Amendment. To illustrate, in future cases a state may contend that it can punish somebody for carrying a Viet Cong flag or even a red flag (see *Stromberg v. California, supra*) on the ground that a patriotic American citizen would be more incensed at these acts than he would be at a personal insult. Surely, we could not say with confidence that this contention would not be true. Thus, we would be inviting states to protect the sensibilities of its citizens at the expense of First Amendment rights. As early as 1917, we said in a different but related context: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Buchanan v. Warley*, 245 U.S. 60, 81 (1917). This principle was reaffirmed in *Cooper v. Aaron*, 358 U.S. 1 (1958) where we held that manifest hostility to integration in schools did not justify state interference with those who sought to integrate it. Yet, the logic of appellee's argument would have compelled us to permit segregation in the Little Rock school system so long as the school board could show that the average citizen of Little Rock would have been more provoked and more likely to retaliate against a Negro who integrated the school system than against an individual who personally insulted him. We did not do that there, and we will not do it here.[96]

Indeed, we can not believe that *Chaplinsky* meant to imply that the mere likelihood of violent response was a sufficient reason to deprive speech of First Amendment protection. Rather, we believe that the real basis of *Chaplinsky* was the fact that insulting or "fighting" words inflict injury by their very utterance. New York argues that the flag desecrator in the same manner inflicts injury by his very act. We find ourselves unable to accept this analogy because we believe the injuries to be of very different kinds. The injury involved in *Chaplinsky* is a very personal type.

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[95] For a discussion of the vicissitudes of the "clear and present danger" test, see Strong, *supra* note 23.

[96] This analogy has not gone unnoticed by commentators. *See, e.g.*, Emerson, *supra* note 23, at 933.

Effectively, the addressee has been verbally slapped in the face. Thus, the statute can be viewed as a special type of assault statute. On the other hand, the injury, if any, of one who witnesses a flag being desecrated is a vicarious one based on his love for his country. While we recognize that in some cases, this kind of injury can be as or more severe than a personal insult, we cannot agree that it is entitled to the same kind of protection. This conclusion is necesssitated by the fact that any other conclusion would mean that if an idea is repulsive enough to enough people, its dissemination could be precluded lest its citizens be injured.

Thus, we refuse to expand upon *Chaplinsky*'s "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problems" and hold that New York may not prevent breaches of the peace with a statute that is so broad that it punishes flag desecration whether or not it is likely to create a breach of the peace.[96]

Fourth: New York contends that this statute is necessary to prevent a violent revolution or attempted revolution. It concedes that there is no "clear and present danger" of a takeover, but argues that the appropriate test is " 'whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' " *Dennis v. United States*, 341 U.S. 494, 510 (1951). The state rightly contends that a Communist takeover or attempted takeover is a very serious evil and that in view of recent events such as the bombing of a building at the University of Wisconsin; the kidnapping and murder of a judge in San Rafael, California; and the increased wave of policemen being killed, the evil is not altogether improbable.[97] Nevertheless, we cannot agree that there is a sufficient relationship between these unquestionably unlawful activities and flag burning. Although it may be true that in some isolated instances the flag burner is calling for "revolution now," the statute is not limited to coverage of these instances. Even if it were, it strains credulity to believe that outlawing flag burning would impede those who were otherwise intent upon waging armed warfare against the United States. Indeed, one of the best ways to head off a potential revolution is to maximize freedom. The last thing this country needs to do is to make a martyr out of some revolutionary by convicting him for flag desecration.

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[96] Indeed, in view of New York's disorderly conduct statute upheld in Feiner v. New York, *supra*, it is difficult to understanding why a special disturbing-the-peace-by-means-of-flag-desecration statute should be necessary.

[97] New York made a similar argument in *Street*. Brief for Appellee at 69-73, Street v. New York, 394 U.S. 576 (1969).

Thus, we find that this staute is not reasonably related to preventing a revolution and therefore interferes with freedom of speech to a greater extent than is necessary for the achievement of that governmental purpose. Thus, it cannot withstand the fourth *O'Brien* criterion.

Inasmuch as none of the state interests have been sufficient to justify the invasion of Ivanavitch's First Amendment rights, we have no choice but to reverse his conviction.

III

We conclude this opinion with a warning to those who would read our decision as a license to destroy property in the name of protest. We emphasize that what we have given Constitutional protection to today is flag burning, not building burning. Indeed, even the right to burn or otherwise desecrate a flag is not absolute. A man who takes a flag from another's flagpole and desecrates it can be convicted of wanton injury to the property of another, whether or not his motivation for so acting was political protest. Similarly, a college student who lowers a university flag to half staff after the college president has ordered it flown at full staff can be convicted of trespass, as can a construction worker who raises a City Hall flag to full staff after the mayor had ordered it flown at half staff. *Cf. Adderley v. Florida*, 385 U.S. 39 (1966). The reason for these results is that where a particular flag is involved, somebody must make the ultimate decision as to where it will be flown, and this decision need not be made by the side which has the largest delegation available to enforce its will. We hold only that a statute that is designed absolutely to forbid public flag desecration cannot constitutionally be applied to one who desecrates the flag as an act of protest.[15] Finally, we wish to emphasize that what we have done today breaks no new ground. We have simply applied well established principles to the resolution of a new problem. As we said in both *Barnette* and *Street*, "The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own." 394 U.S. at 576, 319 U.S. at 641. We cannot let our love and reverence for that flag cause us to weaken the very freedom for which it stands; for that would be the ultimate in flag desecration. *Reversed.*

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[15] We intimate no view as to the propriety of punishing one who burns his flag as an act of protest in violation of a generally valid anti-burning ordinance. The resolution of that question would depend on the substantiality of the municipality's reasons for the ordinance. *Compare* Martin v. Struthers, *supra, with* United States v. O'Brien, *supra*. However, for purposes of today's decision we have assumed *arguendo* that such an ordinance would be valid.

Scene 3

(Outside of the Supreme Court Building a few minutes later)

Igor: Congratulations, Ivan, you're a free man! Johnny sure was right about America; what magnificent libertarian sentiments! You surely wouldn't hear anything like that from any Russian court.

Johnny Trueblood: There really wasn't anything unusual about today's decision. Most of the sentiments you refer to were taken from earlier decisions. It was simply a matter of applying them to this case.

Ivan: I agree with Igor. I was extremely impressed. After seeing how committed this country really is to liberty, you can bet that I'll never again burn the flag that is symbolic of that liberty just because of my dissatisfaction with something that the government or some of its officials are doing.

Igor: I feel the same way about this country, Ivan. You've certainly won a great victory.

Johnny Trueblood: You have indeed won a great victory, Ivan, but our country has won a greater one!

THE END

Postscript: The story presented by the above play is fictitious. The events depicted therein have not yet happened and indeed may never happen. Nevertheless, it is submitted that unless something approximating the opinion depicted in Act III, Scene 2, does transpire, our boasting of being a free society will be *pro tanto* so much rhetoric.

To: The Senate Judiciary Committee

From: Professor Arnold H. Loewy

Subject: Statutory Respose to Texas v. Johnson

I understand that this Committee has copies of my 19-year old law review article entitled "Punishing Flag Desecrators: The Ultimate in Flag Desecration," and my current monograph, "Texas v. Johnson: Moral Legitimacy for United States Proclamations." These documents, to which I may refer from time to time, reflect my view that Johnson is good constitutional law that should be applauded rather than altered. This memo will focus exclusively on the propriety of a statutory response.

At the outset, let me suggest that if, contrary to my advice, you believe that Johnson calls for corrective action, a statute is clearly better than a constitutional amendment. Just as one attempting to cure a headache would try aspirin before brain surgery, Congress should try a statute before amending the Bill of Rights. Even if one is only 50% (or for that matter 10%) sure that the aspirin will work, it surely should be the first resort. Analogizing the first ever amendment to restrict the Bill of Rights to brain surgery is not overly dramatic. Indeed, it is virtually impossible to overstate the harm that such an amendment could do to our constituitional structure.

One could certainly support a statute in the good faith belief that it might be constitutional. I cannot present the case for the constitutionality of such a statute better than Professor Walter

Dellinger's statement to the House Sub-Committee considering this issue. It does not follow, however, that such a statute necessaily would be constitutional. Justice Blackmun, whose earlier view of the propriety of protecting the physical integrity of the flag provided much of the impetus for supporting the constitutionality of a viewpoint-neutral statute, may or may not still adhere to that view. Several of his opinions of the 1980s seem more libertarian and less statist than his opinions of the 1970s. Furthermore, Justice White, who was one of the four Johnson dissenters, has a track record of accepting majority opinions to which he originally dissented and refusing to accept what he considers artificial distinctions. [Compare United States v.Wade, 388 U.S. 218, 250 (1967) with Kirby v. Illinois 406 U.S. 682, 705 (1972) (lineups); and compare Booth v. Maryland, 482 U.S. 496, 515 (1987) with South Carolina v. Gathers, 109 S. Ct. 2207, 2211 (1989) (death penalty)]. Consequently, there is good reason to think that Justice White might vote to invalidate the next flag-burning conviction even under a different statute.

A Viewpoint-Neutral Statute Does Not Fix The Problem

If the problem that at one time bothered the populace (I'm not sure that it still does) were truly the physical integrity of the flag, a viewpoint-neutral statute might solve the problem. However, physical integrity simpliciter is not our concern. For example, if a man burned down a factory to defraud the insurance company, we would consider it irrelevant whether it was a flag factory or towel factory. Because his burned inventory was flags rather than towels, we would not deem him a more serious criminal. In this regard, flags are different from graves, monuments, or other historic landmarks. Those are things whose destruction would bother us regardless of the intent of the destroyer. Indeed, some flags would fit that category, e.g.: the flag that draped President Kennedy's coffin. But a flag qua flag does not.

Yet if this statute were passed, the man who burned down his flag factory could be convicted of one count of fraud and 1000 counts of flag desecration whereas his neighbor who burned down a towel factory would only be guilty of one count of fraud. On the other hand, one contemptuous of the Untited States could publicly burn (and spit on) a flag that is no longer fit for use or is soiled. Indeed, it would not be hard to imagine a Gregory Johnson type "accidentally" spilling ketchup on a flag and then publicly burning his "soiled" flag. The reason that the building burner can be convicted but the protester cannot is that we are trying to punish behavior that bothers us for political reasons under the guise of a neutral statute. The statute is a classic example of trying to plug a round hole with a square peg.

These illustrations should also cause you to question why you want the statute. If you really do wish to protect the physical integrity of the flag, that is if you really do want to add punishment to the man who burns down the flag factory, but not to the one who burns a soiled flag as part of a political protest, there is good reason to support the statute. But if, like most of swastikas would be compromised. Indeed, we would tarnish the very liberty that causes us all to care so very much about our flag.

Practical Politics

Let me close by broaching a subject that all of you must think about, but rarely say out loud: "If I vote against a statute and a constituional amendment, how will I get reelected"? Rather than ignore that question, it should be firmly grasped.

To begin with, I am not sure that public sentiment is all that inflamed. The latest poll that I have seen in my home state, North Carolina (which is certainly no less conservative than the Nation as a whole), is that 1/3rd would like a constitutional amendment, 1/3rd would like a statute, and 1/3rd would like nothing. If that is at all accurate, it would suggest that this is not one of thoses issues upon which your senate careers are likely to stand or fall.

Suppose, however, that you vote against both a statute and a constituional amnedment and at the next election your opponent says: "My opponent, the incumbent, voted against protecting the flag; throw the rascal out and elect me to the senate." How could you respond? I suggest that you not respond in the apologetic way that candidate Dukakis responded in the presidential election. Rather, you should look your opponent squarely in the eye and say: "I know how special our flag is. It stands for freedom and tolerance that no other flag in the world can match. If we punished people for burning it, we would reduce ourselves to the level of Iran or China or Cuba. Our flag means more than that. I will not have our flag reduced to that level. It is people like you who would put our flag on a par with theirs that insult and demean the flag. I'll have none of that, and neither should the citizens of this great state."

Of course it takes courage to vote and respond as I suggest. But one should not in fact demean the flag in order to avoid being falsely accused of demeaning it.

STATEMENT OF HENRY PAUL MONAGHAN[*]
FOR THE SENATE JUDICIARY COMMITTEE,
CONCERNING STATUTORY AND CONSTITUTIONAL RESPONSES
TO THE SUPREME COURT DECISION IN TEXAS v. JOHNSON

Calls for governmental action can be sorted into three categories. In many cases, the costs of any governmental intervention will seem to exceed any putative gains. In others, corrective governmental action seems required. In the third category are the rare cases where the problem is of such a nature that the appropriate governmental response even warrants amending the fundamental law of the land. The flag desecration problem may well fall into the second category. But it does not fall into the third, at least if the American constitutional tradition going back to the Framers of the constitution is to be respected.

I.

Whether the Supreme Court's holding in Texas v. Johnson creates a problem at all is the subject of controversy. I know of no knockdown argument on this topic, but my sympathies are with those who believe that some corrective governmental action should be attempted. For a great many Americans the flag is a unique emblem that should be protected from physical desecration. That the fundamental interest protected is symbolic does not mean that it is not important: "We live by symbols," Justice Holmes once observed. O.W. Holmes, Collected Legal Papers 270 (1920). I am uncomfortable with the idea that (perhaps alone among the countries in the world) this country is powerless to protect the country's most important symbol against physical desecration. And so I find appropriate some government response to Johnson. For me, the fundamental question is whether that response should take the form of a constitutional amendment.

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[*] Harlan Fiske Stone Professor of Constitutional Law, Columbia University School of Law

II.

As is well known, the first ten amendments to the constitution were ratified as a unit in 1792, and they are commonly viewed as part and parcel of the original constitution itself. Since then, the constitution has been amended only 16 times. This sparing resort to the amendment process is not simply a function of the difficulty of the amendment process. It also reflects a long held tradition that the fundamental law should not be freely amended. This point is made by Madison, the principle architect of the constitution. In the Federalist, still the most important work ever written on the constitution, Madison acknowledged that "a constitutional road to the decision of the people ought to be marked out, and kept open, *for certain great and extraordinary occasions*." *The Federalist* No. 49, at 339 (J. Cooke ed. 1861). (emphasis supplied) But in two lengthy essays he decried the dangers inherent in freely resorting to the amendment process. Of special relevance here is that Madison objected to the use of the process where appeals to passion are likely to be a driving force, or as a device for a ready referendum for correcting every perceived constitutional error. See *The Federalist* No. 49, at 340-41; *Id*. No. 50, at 343-47 (J. Cooke ed. 1961).

The fact that the constitution has been amended on only 16 occasions keeps faith with Madison's vision. I can think of no constitutional amendment that has been passed to vindicate purely symbolic interests. See generally, A. Grimes, *Democracy and the Amendments to the Constitution* (Heath 1978). Thus, the proposed constitutional amendment for flag desecration breaks with the heretofore genuinely conservative tradition of approaching the amendment process. More importantly, this break with tradition constitutes a potentially dangerous precedent that at present is wholly unjustified by the nature of the problem.

First. The proposed amendment sets a potentially dangerous precedent because of the view it radiates concerning the constitution and the amendment process. To seek amendment of the constitution on flag desecration invites the view that the constitution itself is properly the focal point for contests over divisive and politically charged symbolic issues, issues that heretofore have been left to the political process with its capacity for compromise and for defusing and softening ideological controversies. Moreover, an amendment now would encourage use of the amendment process as a virtually immediate referendum on all controversial Supreme Court decisions. Perhaps these dangers -- and I consider them dangers -- would not materialize. But they are the kinds of dangers of which Madison warned. In the television era they seem to me too real to be brushed aside.

Second. There seems to me to be no justification for exposing the country to such risks. There is a fair chance that legislation of the character proposed by Senator Biden would be sustained, at least with respect to public desecration. Defense of this position does not require -- and it should not begin with -- an apology for the result in Texas v. Johnson. The result in that case is, in my view, clearly correct. The Texas statute at issue permitted some to desecrate the flag and forbade others to do so, depending entirely on the audience's reaction to the speaker's message. A long line of Supreme Court decisions correctly condemn such discrimination. The difficulty is not with the result, but with the fact that the majority said more than was necessary to dispose of the case. I respect the views of those who think that the Court's reasoning renders invalid virtually any flag desecration statute. See also Ely, Flag Desecration: . . ., 88 Harv. L. Rev. 1468 (1975). But in fact Texas v. Johnson is far too unstable a precedent to permit a confident conclusion that a majority of this Court would reach such a result. Johnson itself was 5-4, and the minority seems adamant. Thus, the fundamental question is whether the proposed legislation is sufficiently different to detach one or more members of the majority. As a predictive matter, that seems to me a fair possibility, given both the discriminatory character of the Texas statute and because the majority opinion itself goes out of its way to state that flag desecration was not immune from all legislative control.[1]

III.

In the present circumstances, it seems to me entirely contrary to our constitutional tradition to resort to the amendment process. It is surely no answer to say that a constitutional amendment would put the flag desecration matter beyond doubt. Even accepting the assumption, the argument mistakes a definition for a justification. Congress does not ordinarily resort to the constitutional amendment process because there is some doubt about the validity of its legislation. Nor should it do so here. It passes credulity to believe that flag desecration presents so overriding a problem that real social harm will ensue if the proposed legislative solution ultimately fails in the Supreme Court.[2] That being the case, it seems to me wholly contrary to a two hundred year old tradition to resort to the process of amending the United States constitution.

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[1] For me, the Court's reasoning is properly viewed as part of the Court's precedent, but that is entitled to less stare decisis weight than the holding. Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 763-67 (1986). The Supreme Court seems less interested in adherence to its prior decisions than I think it should be.

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[2] Whether flag desecration is in fact likely to be a frequent occurrence is a point to which no one can speak with confidence, but I think that some basis exists for the belief that flag desecration will continue as a form of protest. See U.S. Art News, Summer Issue 1989, p. 45 (linking the defendant Johnson with the flag desecration incident at the Art Institute of Chicago).

national grange

Robert E. Barrow, Master

August 3, 1989

The Honorable Joseph R. Biden, Jr., Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The United States Supreme Court recently overturned the conviction of a man who was found guilty of violating the laws of Texas by willfully and physically desecrating the flag of the United States of America. A 5 to 4 majority of the Court voted to overturn the conviction on the grounds that the individual's right to freedom of expression under the First Amendment to the U. S. Constitution was violated by the application of the Texas law.

On behalf of the 325,000 Grange members across the nation, I would like to express the National Grange's disappointment in the Supreme Court's ruling in this case. I was pleased to learn of your public comments expressing your dismay over this decision as was reported in the Congressional Record. I, therefore, urge you to work with your fellow members of Congress and the President to find a proper means of making the willful desecration of the United States' flag a punishable crime under both state and federal law.

National Grange policy, which was adopted last November at the National Grange's 122nd Annual Convention, states in part:

> "The Grange recommends that courts uphold to the fullest extent the provisions of applicable laws pertaining to flag desecration."

We believe that the United States' flag holds a special, symbolic value for American citizens. Millions of Americans have fought and died to protect the blessings of liberty that the United States' flag represents. Displayed proudly in offices, factories, schools, private homes, and wherever Americans gather together, the United States' flag symbolizes the prosperity that our form of government has nurtured. Around the world, the United States' flag is the most widely recognized symbol of freedom and is a beacon of hope for those who yearn for a better life.

The Grange is proud that we make special efforts to provide our local, county and state chapters with information on the proper procedure and etiquette by which to display and honor the United States' flag. In fact, no Grange meeting anywhere in the nation can legally conduct business without a United States' flag being displayed and without an appropriate display of respect for that flag by those who are assembled. We further support efforts to disseminate information for showing proper respect to the flag through radio, television and other media.

We appreciate the value of the right of free speech that is guaranteed under the First Amendment, and we understand that the freedom of expression is a lynch pin of a free society. The range of tolerance that is needed to accommodate a multitude of opinions in a free society must, indeed, be vast. However, that tolerance is not limitless. In this instance, we cannot accept that the ideas of freedom and liberty are being substantially advanced by protecting the willful and physical desecration of the United States' flag. How can we expect to protect and defend our Constitutional rights as Americans if we cannot protect and defend the most poignant, physical symbol of those rights? We cannot.

I, therefore, urge you to work with the President and your fellow members of Congress to fashion statutory language that will satisfy the objections of the Supreme Court and, once again, will allow the United States' flag to be fully protected under law. If such protection is not possible in accordance with the Supreme Court's recent rules, I then urge you to carefully draft an amendment to the Constitution of the United States that will specifically allow federal, state, and local laws to protect the United States' flag from willful and physical desecration.

Thank you for allowing me this opportunity to express the views of the National Grange. I would appreciate learning your views on this issue.

Sincerely,

Robert E. Barrow

Robert E. Barrow
National Master

REB/lwh

Statement of Robert L. Nolan, M.D., J.D.
Before the Committee on the Judiciary,
U. S. Senate
September 12, 1989

I am a combat veteran of World War II, have over 30 years of reserve service, and am a decorated senior reserve officer (ret.). I am a physician and attorney in California.

When I was first appointed a junior officer in training in 1944, the oath of office, which I have proudly repeated on subsequent occasions, was as follows:

> **"I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God."**

That language is significant particularly in its focus upon our allegiance to the Constitution. Our flag is a fitting symbol of our great freedoms, including the Bill of Rights. I respect it and would not condone its demeaning use. However, it's the Constitution that we have sworn to support and defend.

The clamor for a constitutional amendment by the President and some in Congress, in response to the Johnson case, poses a threat to the Bill of Rights and especially the First Amendment.

I agree with the concerns expressed in the attached editorials in the Los Angeles Times (June 28), the New York Times (July 19) and the Washington Post (July 20) and therefore incorporate them in my statement.

Any circumvention of the Bill of Rights via a flag amendment to the Constitution could have adverse effects not only upon our First Amendment freedoms, but lead to future weakening and trivialization of the Constitution itself.

The subject is not as simple as some advocates of a constitutional amendment seem to suggest. The fact that legal issues are complex is demonstrated by the differing views recently expressed by scholars such as Professor Lawrence Tribe, Judge Robert Bork, Professor Charles Fried, and Professor Burt Neuborne.

Therefore, I respectfully offer the following suggestions for action by the Congress:

1) Commision the American Law Institute, or similar body, to study the problem of enhancing flag protection without amending the Constitution, and propose model federal legislation to achieve that objective.
2) Reject proposals to amend the Constitution for purposes of flag protection.

As the Washington Post said two months ago:

> "...The flag is a symbol of a magnificently broad and generous definition of freedom, including the freedom to dissent and the freedom of a tiny minority to stand up against majority opinion. The flag and its message have prospered for two centuries without protection of this constitutional amendment. Gregory Lee Johnson is no threat to it. But congressional tampering with the First Amendment is."

Enclosures: (3)

Los Angeles Times
A Times Mirror Newspaper

Publishers
HARRISON GRAY OTIS, *1882-1917*
HARRY CHANDLER, *1917-1944*
NORMAN CHANDLER, *1944-1960*
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ANTHONY DAY, *Editor of the Editorial Pages*

Dangerous Remedy

There are two possible explanations for President Bush's decision to promote a constitutional amendment prohibiting vandalism of the American flag. Neither does the President much credit.

One is that the advisers who so adroitly manipulated the flag and other popular patriotic symbols during his campaign last year persuaded him to take what political advantage he could of the Supreme Court's ruling that flag burning is a protected form of political protest. The other accepts his notion that the solemn compact by which this nation governs itself ought to change because Bush feels "viscerally" about the issue.

The First Amendment to the Constitution is the most majestic and flexible blueprint for the practical realization of fundamental human liberty ever devised. "Congress," it says, "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

In the 200 years since Congress approved those words as the first and most important provision of the charter we call our Bill of Rights, the United States has passed through armed civil turmoil, foreign wars, global confrontation with aggressive totalitarianism and economic and social changes so profound as to have been unimaginable to the framers. Yet in all that perilous passage, no one, no matter how dire the press of circumstance, has found it necessary to alter the language of the First Amendment or to create a constitutional exception to its application.

Flag burning, with all its connotations of contempt for this country's basic institutions and the sacrifices made to maintain them, is a particularly noxious form of expressive speech. It is, in fact, political pornography. This court, like others before it, has wisely held that tolerance of obnoxious speech is the irritating—but, in the end, not very burdensome—price we pay for that freedom which is the root of all others.

Cooler heads on both sides of the congressional aisle, like House Speaker Thomas S. Foley and conservative New Hampshire Sen. Gordon J. Humphrey, already have expressed skepticism about any attempt to alter the First Amendment. As outrage gives way to prudent deliberation, others doubtless will join them. The cynical, the opportunistic and the merely rash, however vocal, must not be allowed to have their way in this.

It would be a tragic paradox indeed if an attempt to protect the symbol of the American nation became, in fact, an assault on the most substantial foundation of its liberties.

Enclosure (1) to
Statement of Robert L. Nolan

Enclosure (2) to
Statement of Robert L. Nolan

A22 *THE NEW YORK TIMES, WEDNESDAY, JULY 19, 1989*

The New York Times

Founded in 1851

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How to Honor the Flag

With wiser, braver leadership, Americans would by now be celebrating the Supreme Court's flag-burning decision. The inspiring message would have sunk in: Even if some tinhorn thinks he can attract attention by torching one flag in Dallas, all the others wave more gloriously as symbols of liberty and reason.

Instead, Congress is racing to reverse the Court decision. Riding a tide of outraged patriotism, members proclaim that the flag needs to be protected by a constitutional amendment all its own. Even the President of the United States, occupant of the bully pulpit, stoops to exploit the Court decision, just as he exploited a quarrel over the Pledge of Allegiance in last year's campaign.

A leader concerned for the Constitution might be eager to make clear that not one Supreme Court justice approves of setting the flag on fire, while all recognize that doing so is symbulic expression.

Such a leader would hail the strengths of a constitutional democracy in which even this contemptible symbolism is, in a nonviolent political demonstration, protected by the First Amendment.

And such a leader would recognize that, though the outrage felt by many citizens deserves attention, the Constitution deserves respect. It ought not to be amended quickly or lightly — and not at all if a new law can do the job instead.

•

Without such leadership, courage must come from other quarters. Representative Don Edwards of California offers one example. He strongly opposes amending the Bill of Rights. That unprecedented step would itself be a symbol, he argues — of an America so lacking faith in itself that it endows Gregory Johnson, the Texas flag-burner, with the power to lessen the flag's meaning for all Americans. The cleanest course would be for Mr. Edwards to delay action on a constitutional amendment by his subcommittee until passions cool.

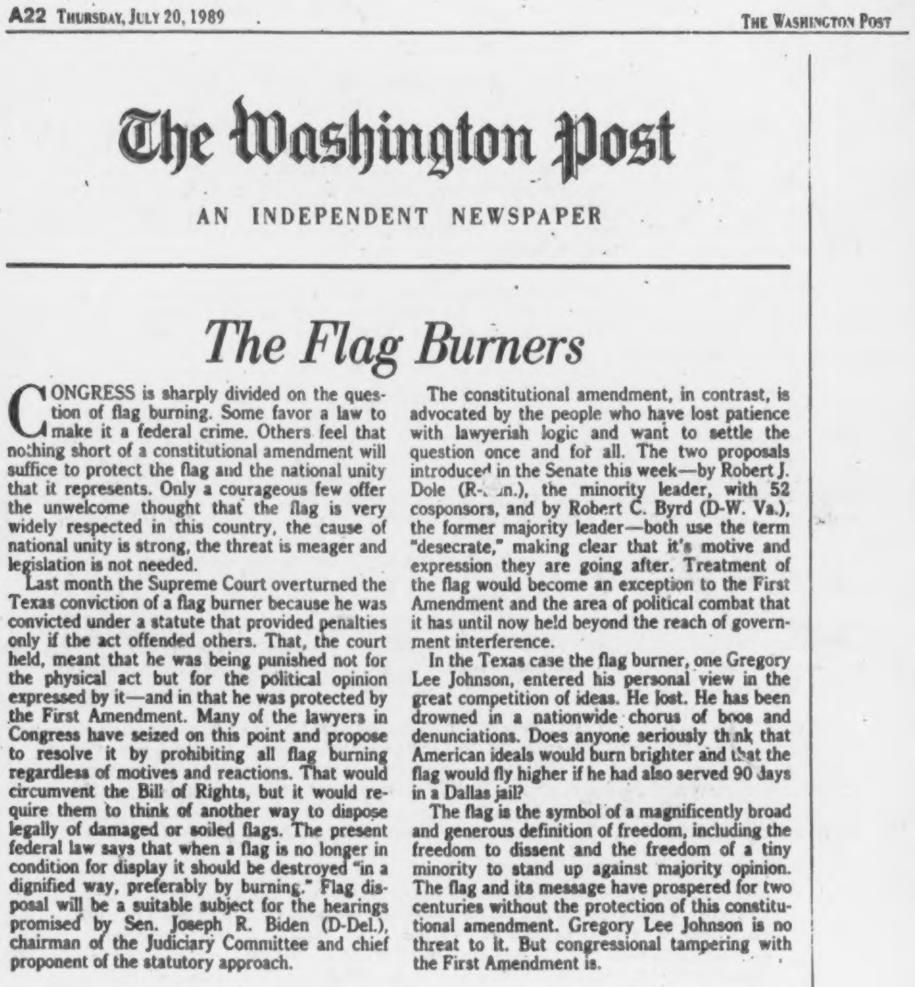
But that may not be possible. Senate leaders already have agreed to vote by this fall on both an amendment and a flag bill like one offered by Joseph Biden, chairman of the Senate Judiciary Committee. Like Gov. Mario Cuomo of New York, Senator Biden argues that a new statute could protect the flag from desecration without having to invade the Constitution.

Advocates contend that a new statute could be written to avoid the offending part of the Texas law struck down by the Court; it defined desecration as mistreatment of a flag knowing that it will "seriously offend" others. The new approach would make flag mistreatment illegal whether done publicly or privately and say nothing about giving offense. That leaves open the question of whether Congress could prevent defendants from raising the same First Amendment defenses as now.

There's a more promising approach: a statute of the kind suggested by Prof. Burt Neuborne in a letter published today, that punishes harming a flag in a setting where such harm is likely to provoke imminent lawless action. The Supreme Court has, over decades, developed standards for that. Such a law would reassert that flag-burning, like other expressive conduct, can lose its constitutional protection and become prohibited — like "fighting words" — when it incites breaches of the peace.

That kind of law would honor the flag and respect ordinary patriotism while averting the present nervous rush to mark up the Constitution. Contemptuous demonstrators would know that breach-of-the-peace laws still apply. Confident citizens would know that for each flag burned in anger, thousands fly in freedom.

Enclosure (3) to
Statement of Robert L. Nolan



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The Washington Post

AN INDEPENDENT NEWSPAPER

The Flag Burners

CONGRESS is sharply divided on the question of flag burning. Some favor a law to make it a federal crime. Others feel that nothing short of a constitutional amendment will suffice to protect the flag and the national unity that it represents. Only a courageous few offer the unwelcome thought that the flag is very widely respected in this country, the cause of national unity is strong, the threat is meager and legislation is not needed.

Last month the Supreme Court overturned the Texas conviction of a flag burner because he was convicted under a statute that provided penalties only if the act offended others. That, the court held, meant that he was being punished not for the physical act but for the political opinion expressed by it—and in that he was protected by the First Amendment. Many of the lawyers in Congress have seized on this point and propose to resolve it by prohibiting all flag burning regardless of motives and reactions. That would circumvent the Bill of Rights, but it would require them to think of another way to dispose legally of damaged or soiled flags. The present federal law says that when a flag is no longer in condition for display it should be destroyed "in a dignified way, preferably by burning." Flag disposal will be a suitable subject for the hearings promised by Sen. Joseph R. Biden (D-Del.), chairman of the Judiciary Committee and chief proponent of the statutory approach.

The constitutional amendment, in contrast, is advocated by the people who have lost patience with lawyerish logic and want to settle the question once and for all. The two proposals introduced in the Senate this week—by Robert J. Dole (R-Kan.), the minority leader, with 52 cosponsors, and by Robert C. Byrd (D-W. Va.), the former majority leader—both use the term "desecrate," making clear that it's motive and expression they are going after. Treatment of the flag would become an exception to the First Amendment and the area of political combat that it has until now held beyond the reach of government interference.

In the Texas case the flag burner, one Gregory Lee Johnson, entered his personal view in the great competition of ideas. He lost. He has been drowned in a nationwide chorus of boos and denunciations. Does anyone seriously think that American ideals would burn brighter and that the flag would fly higher if he had also served 90 days in a Dallas jail?

The flag is the symbol of a magnificently broad and generous definition of freedom, including the freedom to dissent and the freedom of a tiny minority to stand up against majority opinion. The flag and its message have prospered for two centuries without the protection of this constitutional amendment. Gregory Lee Johnson is no threat to it. But congressional tampering with the First Amendment is.

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THE PROPOSED CONSTITUTIONAL AMENDMENT ON FLAG BURNING: BAD POLICY AND BAD LAW

INTRODUCTION

In August 1984, Gregory Lee Johnson burned a flag while demonstrating outside the Republican National Convention in Dallas, Texas. Johnson was arrested, prosecuted and convicted. The Texas Supreme Court overturned Johnson's conviction on the grounds that the Texas flag burning statute was unconstitutional. On June 21, 1989, the U.S. Supreme Court affirmed the decision of the Texas court. The Supreme Court's decision has been met by a chorus of calls for Congressional action. Most prominently, President Bush has proposed a constitutional amendment to address flag desecration.

The question now before the Congress and the American people is not whether we condone or condemn flag burning. The public reaction to the Supreme Court's decision shows that our love of country and the flag is not at issue. Rather, the question is whether we should amend the Bill of Rights. The answer must be a resounding NO.

Erwin Griswold, former Solicitor General and Dean of Harvard Law School has called the Bill of Rights "the center and core of our governmental system . . . the most distinctively American contribution to the art and science of self-government." The Bill of Rights places individual freedoms on a pedestal, out of the government's reach. These freedoms, especially the freedom of expression, make America the envy of the world, an example and inspiration for democratic movements around the globe. In two hundred years, no Congress has ever sent to the states a proposed amendment to restrict the liberties guaranteed by the Bill of Rights.

Freedom of expression lies at the heart of our democratic government and pluralistic society. Having suffered the abridgement of their rights under colonial rule, our nation's Founders knew the importance of free expression. Accordingly, they safeguarded freedom of expression in the First Amendment. A core purpose of the First Amendment was to protect unpopular opinions and expression from suppression by the political majority; in Justice Holmes words, to ensure freedom for even "the thought that we hate." United States v. Schwimmer, 279 U.S. 644, 655 (1929).

The proposed constitutional amendment on flag desecration[1] is a frontal attack on the First Amendment. The First Amendment protects freedom of expression from government intrusion. In direct contrast, the proposed constitutional amendment is specifically designed to empower Congress and the states to pass legislation that limits the freedom of expression -- in other words, to weaken the First Amendment. Limiting the First Amendment freedom of 1expression would diminish what is best and most distinctive in America. Prohibiting and

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[1] The constitutional amendment that Congress will address was proposed in the House of Representatives by Reps. Michel and Montgomery (H.J. Res. 350) and in the Senate by Sens. Dole and Dixon (S.J. Res. 180). Numerous other proposed amendments have been introduced, but it is these two that are supported by the Administration and are scheduled to be the subject of Congressional consideration.

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punishing political dissent may be the expected, if reprehensible, response in Iran, China, South Africa, or other dictatorial, repressive regimes. It is not the American way.

America's tolerance of dissent, codified in the Bill of Rights, must include even the most noxious and repugnant opinions and expressions. As Justice Jackson wrote: "Freedom to differ is not limited to things that do not matter much. The test of its substance is the right to differ as to things that touch the heart of the existing order." West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943). Flag burning tests the limits of our patience and our national resolve to permit the free exchange of ideas. Nonetheless, preserving the First Amendment is far more important than banning the misguided acts of a tiny number of protestors.

THE PROPOSED CONSTITUTIONAL AMENDMENT IS UNPRECEDENTED AND UNNECESSARY

Congress first proposed the Bill of Rights on September 25, 1789. In the intervening 200 years, there have been no restrictions of the liberties guaranteed by the Bill of Rights. The one hundred Congresses that have gone before this one have confronted a civil war and two world wars, enormous expansion of territory and mass population migrations, the integration of millions of immigrants into American society, depression, and social and political upheaval. Through the years, the American political scene has been marked by dissent in all forms, including the most offensive expressions of political opposition. Still, each prior Congress has kept faith with the Framers. Not once has Congress even formally proposed a restriction of the Bill of Rights.

Indeed, attempts to amend the Constitution have been rare in our history. As James Madison anticipated, the amendment process has generally been reserved for matters of overarching importance. Since 1789, Congress has proposed only thirty-three constitutional amendments.[2] Of these, the states have ratified twenty-six additions to the original Constitution, including the first ten amendments that comprise the Bill of Rights.[3] These amendments fall into two broad categories: amendments that perfect the operation of our democratic government and amendments that expanded liberties such as the 13th, 14th and 15th Amendments. The lone exception is the 18th Amendment, which expanded the coercive power of government by imposing Prohibition. That unfortunate amendment is not a source of pride to anyone and was quickly repealed by the 20th Amendment.

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[2] Pursuant to Article V, Congress "proposes" a constitutional amendment when both Houses pass resolutions in support of the constitutional amendment by a two-thirds majority. The constitutional amendment is then sent to the states for ratification. Thousands of constitutional amendments have been introduced in our history, but only thirty-three times has Congress formally proposed an amendment to the Constitution.

[3] The seven amendments that Congress proposed and the states failed to ratify are as follows: (1) an apportionment plan for the House of Representatives, proposed in 1789; (2) a rule on compensation of Members of Congress; proposed in 1789; (3) an amendment that would have withdrawn the citizenship of anyone who accepted a title of nobility from a foreign country, proposed in 1810; (4) an amendment that would have protected slavery by preventing its removal except with the assent of all states in which slavery existed, proposed in 1861; (5) an amendment granting Congress legislative authority over child labor, proposed in 1924; (6) the Equal Rights Amendment, proposed in 1972; and (7) representation for the District of Columbia, proposed in 1978.

In sum, as constitutional historian Michael Parrish recently testified: "If our Constitution has a fundamental bias . . . it is the bias of liberty, the presumption of freedom, the desire to limit the scope of government. These libertarian assumptions inform virtually all of the great amendments adopted since 1790."

Now, two hundred years to the month after the Bill of Rights was formally proposed by Congress, the President has proposed and Congress is considering an amendment restricting the Bill of Rights. Though perhaps an understandable expression of patriotism, the extraordinary remedy of a constitutional amendment is out of balance with the size and nature of the problem, a Supreme Court decision about an isolated case of flag burning. As Sen. Gordon Humphrey has pointed out, there is no outbreak of flag burning. Twenty years ago, many people did burn flags to protest U.S. involvement in Southeast Asia. The act was no less offensive then. But there was no rush to amend the Bill of Rights.

Flag burning simply is not a threat to the nation; it represents the inarticulate expression of an infinitesimal number of extremists. The President has proposed a medicine far more toxic than the ill it seeks to cure. As Geoffrey Stone, Dean of the University of Chicago Law School and a First Amendment scholar, testified before the Senate Judiciary Committee:

> The Constitution of the United States is our fundamental charter of government. We should not tamper with it to adjust for what must fairly be understood as matters of only secondary importance in the overall scheme of American government. We have not in the past, and we should not in the present, submit to the temptation to invoke the solemn processes of constitutional amendment to override a decision of the Supreme Court just because it offends -- or even deeply offends -- a substantial majority of our citizens. Such a practice would clutter, trivialize and, indeed, denigrate the Constitution and the broad principles for which it stands.

If flag burning poses no threat to our security or our patriotism, why is a constitutional amendment being advocated? For some, unfortunately, the answer is political expedience -- an opportunity to capitalize on patriotism. The President's Chief of Staff reportedly urged House Republicans to pursue the constitutional amendment as a "wedge issue" between Republicans and Democrats. We do not believe that the American people respect this type of cynical political gamesmanship when the Constitution is at stake. Though we revere the flag, we will not countenance politically motivated tampering with the Bill of Rights. There need be no competition over who loves America and its flag more. When the politicking and posturing is set aside, Congress must face the sobering question of whether an amendment to the First Amendment's guarantee of free expression should be sent to the states.

THE PROPOSED CONSTITUTIONAL AMENDMENT WOULD DIMINISH AMERICA'S STANDING IN THE WORLD

Those who advocate a constitutional amendment view it as a show of strength, an identifiable demonstration of the greatness of America. Sadly, it is just the opposite.

Prohibiting and punishing dissent is the hallmark of unpopular, repressive regimes. Compelled allegiance to the government and its symbols is the telltale sign of a tyrannical government. It does not surprise us to read that a Chinese court sentenced a primary school teacher to life in prison for the crime of splashing paint on a portrait of Chairman Mao Zedong. Nor are we surprised to learn that political dissenters in Iran are executed. And we are not surprised to read that South African police broke up a group of students singing freedom songs and whipped peaceful protestors. We are not surprised because these governments do not enjoy the support of their citizens; they can only obtain loyalty by compelling it; and they can only gain reverence for national symbols by requiring it. The fear of free expression, played out in the quashing of dissent, betrays the inescapable weakness of these regimes.

In contrast, governments that enjoy widespread popular support are not threatened by dissent. In these countries, patriotism comes naturally. America is the greatest example of these truths. The source of our strength and security is that Americans support our democratic form of government and love our country. The legitimacy of our government is not threatened or diminished by the dissent of a small minority, even when that dissent takes highly offensive forms. Quite the contrary, as constitutional historian Michael Parrish testified: "In a system of government like ours, where the people are the ultimate sovereign, where officials govern by the consent of the governed, the punishment of people who show contempt for that government or those officials is an utter and complete contradiction. So believed James Madison and the others who wrote the First Amendment."

Consequently, we do not jail dissenters, even extremely vocal and offensive dissenters. As Justice Jackson wrote: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matter of opinion, or force citizens to confess by word or act their faith therein." West Virginia Board of Education v. Barnette, 319 U.S. 624, 642. This tolerance of dissent, and the unwillingness to require adherence to an orthodoxy of thought or belief, are emblems of America's strength.

America's protection of individual rights and tolerance for dissent is an example that inspires freedom-seekers around the world. America is a beacon of hope for those who struggle to overcome oppressive regimes and establish democratic governments. From South Korea to the Philippines to the Soviet Union, people strive to replicate the American ideal of individual freedom. In recent testimony, former Solicitor General Charles Fried, an immigrant from Czechoslovakia, described America's importance to those who live under repressive regimes: "To the Czechs . . . America was a model and ideal. Foremost among [America's] values is the principle that no one shall be punished for his political expressions -- no matter how offensive or bizarre. That commitment to liberty is our first and greatest contribution to the history of mankind."

While giving hope to democratic movements, the American example also strikes fear in those who suppress the individual rights of their citizens. Former prisoner of war James H.

Warner recently recounted how powerful the idea of freedom was, even to the North Vietnamese captors that tortured him.

> I remember one interrogation where I was shown a photograph of some Americans protesting the war by burning a flag. "There," the officer said. "People in your own country protest against your cause. That proves you are wrong."
>
> "No," I said. "That proves that I am right. In my country we are not afraid of freedom, even if it means people disagree with us."
>
> The officer was on his feet in an instant, his face purple with rage. He smashed his fist onto the table and screamed at me to shut up. While he was ranting I was astonished to see pain, compounded by fear, in his eyes. I have never forgotten that look, nor have I forgotten the satisfaction I felt at using his tool, the picture of the burning flag, against him.

Flag burning does not diminish America. Neither Americans nor people in other countries think less of America because an extremist burned the flag. But amending the Bill of Rights to outlaw certain political dissent will influence what Americans and foreigners think of America. If we change the Bill of Rights, if we outlaw certain political expression, our adversaries and detractors will be the victors. We will have done what no flag burner could -- we will have diminished America.

ATTEMPTS TO BAN OFFENSIVE POLITICAL EXPRESSION WILL BE UNSUCCESSFUL, BUT MAY LEAD TO FURTHER LIMITS ON FREE SPEECH

Some have argued that the proposed constitutional amendment does not really limit free expression in any important way, that America will not be a different place and free expression will not suffer from a constitutional amendment on flag burning. This is wrong.

There has always been, and will always be, political expression that is offensive to the majority. To express their political opposition most forcefully, dissenters will often gravitate to the most revered symbols of the institution they oppose. If flag burning is outlawed, those who wish to express profound opposition to America's policies may burn likenesses of Uncle Sam in effigy, or spit on photographs of the President, or trample upon replicas of the Constitution, or destroy models of the Capitol, the White House, the Lincoln Memorial. Or they will find a hundred even more imaginative and offensive ways to make their point. Will we try to ban each of these forms of expression in turn? Will we propose a constitutional amendment each time an ingenious protestor mistreats an item or symbol that we hold dear?

Furthermore, anti-American sentiments are not the only expressions that the vast majority of Americans find abhorrent. The hooded hatred and cross-burnings of the Ku Klux Klan are unanimously condemned. Similarly, the swastikas and racist rantings of neo-Nazis deeply offend Americans. Many citizens revile pornography as demeaning or immoral. In short, there are many opinions and expressions that most Americans deplore. But, it is impossible to prohibit all expression we find offensive, and it is wrong to try.

Thus, while a constitutional amendment that prohibits flag burning may seem innocuous, it will either be a total failure because new forms of equally or more offensive expression will arise, or it will be a dangerous precedent because it provides a blueprint for future efforts to ban offensive speech. Rather than taking the first step down this road, the wise course is to heed the cautionary counsel of Justice Oliver Wendell Holmes:

> I think we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is necessary to save the country. Abrams v. United States, 250 U.S. 616, 630 (1919).

Though we may not like political dissent, particularly dissent expressed through such repugnant acts as flag burning, the prospect of curtailing political expression threatens our democracy more than even the most offensive dissent.

THE PROPOSED CONSTITUTIONAL AMENDMENT IS SO POORLY DRAFTED THAT ITS IMPACT IS UNCERTAIN AND UNPREDICTABLE

The proposed constitutional amendment is designed to protect the flag. Though no doubt drafted in good faith, the proposed amendment is laden with problems. The full text of the proposed constitutional amendment reads as follows:

> The Congress and the states shall have power to prohibit the physical desecration of the Flag of the United States.

Close examination of this language leads to the conclusion that the proposed constitutional amendment is so inartfully drafted that it might not achieve its stated purpose and might lead to numerous unintended results.

First, the proposed constitutional amendment's impact as part of the Constitution is totally unclear. The language of the amendment is patterned on the power-conferring clauses of Article I. By its very terms, then, the proposed constitutional amendment does nothing more than give Congress and the states the authority to pass legislation prohibiting the physical desecration of the flag.

Moreover, the proposed constitutional amendment says nothing about the interaction of the new provision with other provisions in the Constitution. The Constitution enumerates certain areas over which Congress has jurisdiction, but the exercise of these enumerated powers is subject to and constrained by the Bill of Rights. This is true not only for power exercised under the original portions of the Constitution, but also to authority granted in subsequent constitutional amendments. Thus, as constitutional scholar Walter Dellinger recently testified:

> "Nothing in the text of the proposed amendment would exempt the exercise of that power from the constraints of the First Amendment. Therefore, (on this reading) the amendment would not alter the Supreme Court's decision in Texas v. Johnson. Any act passed under the amendment would still have to satisfy the First Amendment, and any

> statute which, like the Texas statute, made the criminality of burning turn on the nature of the message being communicated, would still be invalid under Johnson."

In short, under this analysis, the proposed constitutional amendment would neither add to existing Congressional authority nor change the First Amendment's requirements.

Presumably the authors of the proposed constitutional amendment intend that the new provision would override the First Amendment in regards to flag burning. However, the text of the amendment does not even address the manifest conflict between the First Amendment and the proposed provision. The interaction of the proposed constitutional amendment with other provisions of the Bill of Rights is similarly uncertain. Is the Fourth Amendment protection against unreasonable search and seizure waived? And what of the Eighth Amendment protection against cruel and unusual punishment? Could a state pass legislation that imposes a draconian penalty for physical desecration of the flag without violating the Eighth Amendment? On its face, the proposed constitutional amendment does not provide answers to these critical questions, and the intent is still unclear.

In addition to the very serious constitutional questions discussed above, the terms used in the proposed constitutional amendment are so inexact that no one can say what legislation would be a permissible exercise of the authority granted by the new constitutional provision. For instance, the term "physical desecration" is not defined at all. Does this term encompass only burning or trampling upon the flag? How will we treat veterans who burn the flag in honor of fallen comrades? Is respectful physical alteration of the flag permitted? What of the family that wrote "We love you, Jimmy" on a flag and placed it below his name at the Vietnam Memorial? And what about displays, such as flying the flag upside down, that leave the flag intact, but are meant to reflect negatively on the flag?

The proposed constitutional amendment also does not say what the "flag" is, so we are left unsure of what is protected from physical desecration. Does the "flag" include commercial uses of the symbol -- could we not throw away a paper cup with a flag printed on the side? What about the stamp with the flag -- could this stamp not be cancelled? How about photographs or video images of the flag -- would destruction of these be physical desecration of the flag? Once again, all of these questions remain unanswered by either the text or the authors of the proposed constitutional amendment. Because the proposed constitutional amendment does not make clear what type of flag legislation is permissible, it would surely lead to a multitude of court cases in which individual laws are challenged.

Finally, the proposed constitutional amendment would give this uncertain and indistinct authority to pass flag protection legislation not only to Congress but to the states. It is a well-established principle that such a reference to the states includes local governments and subdivisions of the state. The proposed constitutional amendment would therefore empower as many as 14,000 governing bodies to pass legislation prohibiting physical desecration of the flag. At best, this unbounded grant of authority to the states would result in a patchwork of conflicting but not totally incompatible flag protection laws; at worst, it could lead to a confusing and chaotic situation of overlapping, contradictory laws.

The proponents of the constitutional amendment present the amendment as a panacea, the simplest and most specific way to address a discrete problem. In fact, it is just the opposite. As described above, the proposed constitutional amendment might do nothing more than confirm existing legislative jurisdiction over the flag. And because the amendment leaves so many crucial constitutional and statutory questions unanswered, it would give rise to a multitude of disparate laws, which in turn would inevitably lead to endless and needless litigation.

SUMMARY AND CONCLUSION

Throughout our history, there have been political leaders who have sought to establish loyalty tests. Though often temporarily successful, these efforts are so contrary to basic American ideals that they quickly fail and their advocates ultimately look foolish. For instance, in 1798, Congress passed the Sedition Act, which converted serious criticism of the government into defamation, arming the government with criminal sanctions with which to silence its critics. The Sedition Act expired two years later, and was never revived. The new President, Thomas Jefferson, pardoned and freed all violators still held in prison and Congress ultimately agreed to pay the fines levied against anyone convicted under the Act. More recently, Sen. Joseph McCarthy undertook a witch hunt against Communists in America and tried to impose loyalty tests across the country. These are embarrassing departures from the American tradition of protecting free expression and tolerating divergent political views. A constitutional amendment against burning the flag, although it may have seemed appropriate in the moments immediately following the Supreme Court decision, would be another unfortunate effort to enforce patriotism through law.

The proposed constitutional amendment would neither increase respect for the flag nor devotion to America. It would, however, compromise much that is special about America. It would tarnish the Bill of Rights, cut back on individual freedom and encourage further suppression of political dissent. If this constitutional amendment is adopted and ratified, we will have done more damage to America than a thousand Gary Lee Johnsons could have hoped to inflict. Congress should preserve the sanctity of the Bill of Rights by rejecting the proposal to limit the freedoms guaranteed by the First Amendment. In debating and ultimately rejecting the proposed constitutional amendment, we will renew our faith in the Constitution and reaffirm our ideals -- an appropriate way to celebrate the 200th anniversary of our Bill of Rights.

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PREPARED STATEMENT OF THE HONORABLE FRED SCHWENGEL
PRESIDENT, U. S. CAPITOL HISTORICAL SOCIETY
BEFORE THE SENATE JUDICIARY COMMITTEE

"The Message and Mission"

Mr. Chairman and Members of the Committee:

In my public life I have been invited and have responded to invitations to make Flag Day speeches--in all 31 times, five times on the East Front of the U. S. Capitol and twenty-six times in different parts of the United States. I have a growing interest in our flag. It should be of no surprise that my interest has quickened since the Supreme Court handed down the now famous decision on the flag desecration. I have become excited, have pondered and have reached some conclusions. My conclusions are reflected on what I have said on many occasions. As President of the U. S. Capitol Historical Society, with an abiding interest in promoting a better understanding of our history, I have become more interested in pursuing a better understanding of the flag. After counseling with my historians and friends I have decided to write this article; entitled THE MESSAGE AND MISSION of the U. S. Capitol Historical Society.

On the many occasions that I have talked on the flag I have noted in my messages that the flag of the United States is unparalleled and unsurpassed as the emblem of everything for which the nation stands. The words "emblem" and "symbol" seem weak and inadequate to convey the true meaning and power of the Stars and Stripes. As General Arthur MacArthur said of the Flag, "It is the one focus in which all unite in reverential devotion."

Old Glory has inspired poets, composers, and artists. Francis Scott Key's "The Star Spangled Banner," John Philip Sousa's "Stars and Stripes Forever," and the colorful, evocative paintings of Childe Hassam continue to inspire patriotic sentiments.

As part of my message, I have pointed out that perhaps no flag of any nation has the ability to mean so many things to so many people all over the world. In large part this is due to the fact that Our Flag represents more than a country with geographical boundaries. It represents the very principles and ideals of liberty, democracy, and self-government on which this nation was founded; and it has promoted the five great freedoms and a Constitution without parallel by any other nation.

A nonprofit educational organization chartered under the laws of the District of Columbia, August 3, 1962

The flag message includes the fact that the flags of the 50 states orbit as satellites of our Flag. With the Great Seal of the United States and the seals and mottoes of the states, they comprise a rich and meaningful array of symbols. Few Americans, perhaps, are aware that the phrase "In God We Trust" was adopted as the official national motto in 1956, or that it is also the state motto of Florida. The mottoes of the states are a virtual catalog of American values: Regnat Populus "The People Rule" (Arkansas); "Liberty and Independence" (Delaware); "Wisdom, Justice and Moderation" (Georgia); "Equality before the law" (Nebraska); "All for your country" (Nevada); "Virtue, liberty, and independence" (Pennsylvania); and "Our Liberties We Prize, and Our Rights We Will Maintain" (Iowa), to name but a few.

Periodically, we need to be reminded of the meaning of our national symbols, of which the United States Flag is chief. It is too easy for us to let the Flag become just a symbol and the Pledge of Allegiance just words. The recent Supreme Court ruling should prompt us to teach the meaning of what the Flag and the Pledge of Allegiance stand for perhaps more than an amendment or legislation, education is the most appropriate response to the Supreme Court ruling. What is the most dignified and meaningful method for honoring our nation and its emblems? President Dwight D. Eisenhower addressed the same question during the height of the McCarthy period in the fall of 1953. His answer is the best that I have ever read, and I recommend its guidance to this committee's deliberations: "A people or a party that is young and sober and confident and free has no need of censors to purify its thought or stiffen its will. For the kind of America in which we believe is too strong ever to acknowledge fear--and too wise ever to fear knowledge." What President Eisenhower was suggesting is that in issues such as the one presently before this committee education rather than legislation or an amendment to the Constitution is the appropriate response. The recent Supreme Court decision should thus cause us to renew our efforts in teaching the history and meaning of the flag of our great country.

Accepting the challenge that comes from the debate on the Supreme Court decision on the flag desecration, and to further the message of education, the United States Capitol Historical Society has just accepted the challenge to help people better understand the flag. Thus it has published a 40-page booklet, The Flag of the United States and State Flags, Seals & Mottoes, to make information on these uniquely American symbols readily available to the public. The booklet contains information on the flags, seals, and mottoes of the nation and the 50 states, as well as 8 pages of full color illustrations. In the center page of the book we have assigned a state to each star in the flag. Each star of course represents a state flag, a state motto and a state seal. They are arranged so that in many ways they embellish, support and explain what the flag of the United States stands for. A major contribution of the book is on Page 40, a bibliography put together by Donald Kennon, Chief Historian and Mary Lee Kerr, Assistant Historian of the Society. This list of books represents what I believe are among the best single resources of knowledge on American flags and symbols. All the other virtues pointed out in the booklet I believe are a worthwhile conclusion that no flag of any nation in the world enjoys this kind of tribute to the flag. Where in the world can you find every school house flying the flag of its nation or every church displaying the flag of its nation. Where in the world can you witness on public occasion the eloquent signing of the Star Spangled Banner scored with the Pledge of Allegiance to the flag.

This is the message that is featured in the book we have published. The poster that goes with it is a companion piece. Here the flag of the United States is surrounded by all the state flags and the dissertation entitled "I Am The Flag." Incidentally, that is a summary of the final version of the 31 different flag speeches I have given on many different occasions in America. Thousands of other Americans have spoken on the flag, many more eloquently than I have on this same theme.

Maybe a logical conclusion should be that it is fortunate that we had something to stir our thinking and challenge our loyalty such as the Supreme Court decision on the flag desecration. This will give Americans something to ponder on, to reflect on and to be inspired again by finding a more thorough and adequate understanding of the flag. To this end, the United States Capitol Historical Society has taken as its Mission the possibility of launching a nationwide essay contest for secondary school students on the subject of the flag.

Mr. Chairman, the United States Capitol Historical Society, consistent with its charter objectives to perpetuate an informed patriotism is pleased to present members of the Committee with copies of our Portrait Set, consisting of the Flag Booklet and Poster. It is our hope that these educational items, which have been approved by the National Flag Day Foundation and several national service organizations, will help to teach Americans of this and future generations to understand and therefore to revere the United States Flag. To this end, it is the Society's Mission to distribute the Flag Portrait set to schoolchildren all across the nation through the state departments of public instruction and parent teachers associations. An essay contest at the state level will then be sponsored. Using the Flag Booklet's bibliography, students will be challenged to ponder the meaning of the Flag both in American history and in the present. If I might conclude with a quote from Justice Brennan's decision--"The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." Our final conclusion is that rather than to have an amendment to the Constitution to deal with the Supreme Court decision and/or a law, it may be much more effective to have the people really understand the meaning of our flag.

Those who are in agreement with the fact that the American flag needs to be better understood and to help the objectives of the U. S. Capitol Historical Society's Mission may order a flag book and a flag poster from the Society. The book sells for $3.50 postpaid. The poster sells for $4.75 postpaid. The combination flag book and 16"x20" "I Am The Flag" poster sells for $7.75 postpaid. Checks should be made payable to the United States Capitol Historical Society, 200 Maryland Avenue, N.E., Washington, D. C. 20002. Bulk rates are available on orders of 100 copies or more, please call (202) 543-8919.

Why not buy a flag portrait set for your friends, your favorite school and/or organization to help us perpetuate the goals and objectives of the U. S. Capitol Historical Society.

Notes on the Proposed Anti-Flag Desecration Amendment to the Constitution of the United States

There are two kinds of issues raised by the proposed amendment: (1) Its scope, i.e., what it does and does not empower Congress and the States to do; (2) Its reflex action on the Bill of Rights and the fourteenth amendment, i.e., the extent to which it displaces or overrides pre-existing constitutional guarantees as interpreted and applied in decisions by the Supreme Court. I shall address the second question first. Having done so, I shall then show how it bears on the first question as well.

I.

The proposed amendment to the Constitution would provide as follows:

> The Congress and the States Shall have Power to Prohibit the Physical Desecration of The Flag of The United States.

Texas v. Johnson is the case that gave rise to this proposed amendment. But it is not clear that the amendment would have any effect on a case of the same kind at all. In *Texas v. Johson,* the Texas state court of appeals did not reverse Johnson's conviction on the basis that the State of Texas lacked legislative authority to legislate in respect to the subject of the national flag. Rather, it reversed his conviction on the basis that the facts of the case placed Johnson's particular conduct within the protection of the first amendment. And it was this judgment that the Supreme Court affirmed.

The proposed amendment does not speak to the first amendment and does not declare that the first amendment is inapplicable to such a case. Thus, it does not provide anything like the following language:

> The first amendment shall be deemed inapplicable to such federal or state legislation as may prohibit the physicial desecration of the American flag.

Nor does it propose anything like the following terms:

> Neither the first nor the fourteenth amendment shall be construed to forbid the conviction of any person who violates a law of the United States or of any State that prohibits the physical desecration of the flag of the United States[1]

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[1] *Compare* the wording of the eleventh amendment which is in this form as an amendment. The eleventh amendment was proposed and ratified in reaction to a particular Supreme Court decision (*Chisholm v. Georgia*, 2 Dall. 419 (1793)). It is reflexive--it refers to something else found in the Constitution, and it says how that something else is (or is not) to be construed. It disallows that other provision (a provision in Article III of the Consutution) from being applied to a certain kind of case, namely, any case brought against a state by a citizen of another state. The proposed amendment, in contrast, is unlike the eleventh amendment, i.e., it does not purport to say how the first or fourteenth amendment shall be construed or applied. Specifically, it does not say that neither shall be construed to be applicable to acts of physical desecration of the flag of the United States.

Rather, the amendment simply tracks the form of other clauses descriptive of affirmative powers vested in Congress, e.g., provisions such as these:

> The Congress shall have Power to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes[2]
>
> The Congress shall have Power to establish Post Offices and post Roads[3]

These clauses similarly and expressly empower Congress to do certain things. On its face, the proposed amendment is identical to each of these clauses:

> The Congress and the States Shall have Power to Prohibit the Physical Desecretion of The Flag of The United States.

The first amendment fully applies to any act adopted by Congress pursuant to any of its well-known, enumerated express powers.[4] The proposed amendment seeks no exception of itself. If, then, though an action of the sort that Johnson participated were subsequently to be prosecuted pursuant to some state or national law based on this amendment,[5] if the act of "physical desecration" thus sought to be punished were considered to be within the first amendment in light of the totality of circumstances involved in the particular case,[6] it is not removed from that protection by anything this amendment implies. Respectfully, I do not

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The proposed amendment is also unlike the sixteenth amendment, an amendment also proposed and ratified in reaction to a particular decision by the Supreme Court (*Pollock v. Farmers' Loan & Trust Co.* 157 U.S. 429 (1895)). The sixteenth amendment provides that taxes on incomes may be levied without apportionment among the several states by population. It thus makes quite clear that to whatever extent such taxes might previously have been valid only if apportioned by population, according to the Supreme Court's interpretation and application of the express requirement found in Article I, Section 9, Clause 4, income taxes would not hereafter be subject to judicial review on grounds of failing to conform to the apportionment clause since income taxes were, by the sixteenth amendment, made expressly exempt from that requirement.

[2] Article I, Section 8, Clause 3.

[3] Id. Clause 7.

[4] E.g., an act of Congress may be fully constitutional as an exercise of its "power to regulate commerce among the several states," but if the "commerce" is commerce in books, and if the regulation is one that seeks to restrict their free circulation, it may be invalid on pure first amendment grounds. In turn, the power to establish post offices and post roads is separate from the power vested in Congress to regulate commerce among the several states, but every act providing for the treatment of the mail is subject to first amendment review. (Indeed, the first decision of the Supreme Court ever to invalidate an express act of Congress on first amendment grounds involved an act regulating the use of the mails, *Lamont v. Postmaster General* 381 U.S. 301 (1965).)

[5] An act, say, making it a state or federal offense for any person "physically to desecrate the flag of the United States..."

[6] Contrast an act of physical flag desecration clearly not protected by the first amendment as construed by the Supreme Court, i.e., by stipulation it could not escape successful prosecution.

believe the authors or sponsors of the proposed amendment have thought this matter through.

The origin of the proposed amendment lies in the felt dissatisfaction of those who sponsor it with the manner in which the Supreme Court has construed and applied the first amendment. They have not, however, been helpful or clear in respect to what it is that so offends them or why they do not want the Supreme Court to involve the first amendment when a particular flag is used.[7] But, respectfully, if they mean to oust the first amendment from further consideration in this matter (and again, it is not clear why they should desire that this be done) it is incumbent upon them to say so and to declare the extent of their will in the express terms of the amendment they propose in order to carry into our Constitution that very design. But that kind of amendment is quite different than the amendment that has been introduced, and accepts a much different burden than the burden reflected in the current proposal. It discharges the necessary obligation to declare that this nation does not want the first amendment to be available to anyone "physically desecrating" some facsimile of "the flag" of the United States. It accepts the onus of persuading two-thirds of Congress and three-fourths of all the States that this is constitutionally desirable. Suffice it to say, this amendment does not do so. Indeed, it addresses none of these matters at all.

The fact is that the proposed amendment says nothing whatever of how the Supreme Court is to construe and apply the first and fourteenth amendments in cases involving acts of physical flag desecration. It affects no current, and it proposes no future, interpretation of the first amendment. Indeed, if that is so (and, respectfully, I urge of the Committee that it seek of the sponsors some proof it is not so), the amendment is misleading and poor. It does not reverse *Texas v. Johnson*. Likewise, it does not direct any different outcome in any like case in the future. It does no more than disfigure the Constitution of the United States with additional language empowering Congress and the states to prohibit acts of physical flag desecration, still subject to all limitations in the Bill of Rights.

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[7] The Supreme Court has over the years reviewed a half-dozen criminal convictions involving flag use, including "the" flag of the United States. It has found no difficulty sustaining regulations restricting the commercialization of flags or flag facsimiles as an incident of hawking goods or promoting sales. On the other hand, it has experienced genuine problems in sorting out other events. An individual who, believing a national policy to be wrong and unworthy of the United States may signal his message even in the manner of an international distress signal, i.e., by flying the flag on his car antenna or his own front window upside down. Another may emboss it with the tar[illegible] superimposition of a peace sign. Are these to be deemed criminal acts, exempt from the first amendment? And, if so, why? A case may in fact involve a black veteran, grief-stricken by the first news account he receives by radio of the purported shooting in the South of a civil rights figure. Weeping, he takes his own flag to the street beside his apartment. Cradling it, he burns it, in despair. Is this a crime? Does one see no first amendment issue at stake? (For cases dealing with these and with other variations, see, e.g., *Spence v. Washington*, 418 U.S. 405 (1974); *Street v. New York*, 394 U.S. 576 (1969); *Smith v. Goguen*, 415 U.S. 566 (1974); *Radich v. New York*, 401 U.S. 531 (1971), *aff'g*, 26 N.Y.2d 114 (1970), *on habeas in U.S. ex rel. Radich v. Criminal Ct.*, 459 F.2d 754 (2d Cir. 1972), *cert. den.* 409 U.S. 115 (1973); *Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Stromberg v. California*, 283 U.S. 359 (1931); *Halter v. Nebraska*, 205 U.S. 34 (1907).)

II.

If the amendment does mean to exempt from first amendment review such legislation as somehow will fit the terms of the amendment itself (although, again, it does not so declare), however, it then becomes crucial at least to have an exact understanding of the extent to which that is meant to be true. But the amendment leaves the matter completely at sea. I submit, moreover, that it is not clear what the amendment exactly aims at, much less what it does or does not sweep outside the first amendment's protection. To the contrary, the more one considers actual cases, the less clear the scope of this amendment becomes.

I understand the point of restricting the amendment to "physical" desecration to be the intention to reach only forms of *actual* physical disfigurement, whether by mutilation, burning, tearing, or actual spitting on it, or some other physical besmirching of it in some other way. It assuredly does not mean to reach mere words of contempt or verbal expressions of derision about the flag or, presumably, about anything which in the opinion of the offending speaker, the flag allegedly represents. As long as the flag is not itself physically desecrated, i.e., as long as it is intact, unaltered, unmutilated, unburnt, ***physically unsullied***, the amendment is still in its sheath. Certainly an ordinary citizen's posting of the flag, on a standard angled from his own porch in the usual way, is not meant to be affected by any legislation possibly based on this amendment. To the contrary, it is doubtless agreed that this is an altogether appropriate display.

But likewise, then, the (patriotic?) flying an intact flag, giant size, from a flag pole outside a Hardee's Fast Food Restaurant is not reachable by any legislation derived from this amendment. Whether some might regard this to be an inappropriate (because commercial) use, even one in their view mildly desecrative (because it seeks to identify the commercial product of the entrepreneur with the national flag), there is surely no intention of reaching such a use by legislation connected with this amendment. The flag's use may be objectionable to some, even conceivably mildly "desecrative" in some sense, but "physically" desecrated, certainly not.

An American Nazi Party march, otherwise protected by the first amendment, and involving the carrying of a sound, unaltered, intact, American flag at the head of the march likewise involves no mutiliation, alteration, burning, spitting on, rending, etc. of the standard itself. There is no "physical" desecration of the flag here, any more than in the presupposed Hardee's Restaurant case.

What, then, of another who merely displays the flag upside down in a similar parade. Is there any "physical" desecration here? On what basis would one presume so to say[8]? Next, then, to the different case of another who carefully affixes removable tape in the shape of a Peace Symbol and displays the flag in his home front window rightside up? Is this an act of "desecration" at all? To be sure the flag thus displayed has a superimposed figure temporarily affixed; yet the flag is not mutiliated, burned, rended, dirtied, or soiled.[9] It is hung properly, moreover, and so in what respect is this an act of "physical desecration" of the flag?

If we continue this new turn of emphasis from the requirement of some kind of physical sullying or physical changing (mutilation, burning, etc.) of a flag, to the conjunctive requirement of "desecration," how much further along do we get? In the case of the person who, grief-stricken with the news of the assasination of a civil rights figure, weeps over his flag and cradles it in his arms, even while burning it on the sidewalk beside the tenement where he lives, is this an act of desecration? Does the regret, the anguish, the whole posture of the person suggest that it is? Yet, we have put the instance of a flag burning, nothing less. And were this person arrested, the question of this person's constitutional protection again at once comes up. Would legislation applied by some state, to this case, be deemed exempt from first amendment review, if this amendment is adopted? But why would one think it is so? If this anguished incident of publicly-expressed grief were deemed by the Supreme Court to be sheltered by that amendment which many Americans regard to be the most important of all the amendments ever added to the Constitution of the United States--the first amendment--who in this Congress would want to rise and condemn the Supreme Court?

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[8] Where the flag thus carried or displayed upside down is intact, unmutilated, etc., the flag is not physically desecrated. If, to reach this case, one is inclined to stretch the word "physically" to include the manner of displaying an intact flag (e.g., displaying it upside down) on the reasoning that such a manner of display is inappropriate and disrespectful of appropiate flag display, then one needs to reconsider all the cases just posed. (Many may conclude that for an American Nazi Party to parade with the flag is itself "physically" to "desecrate" the flag. May Congress and state legislatures confine use of the flag to mainline political parties in the United Sates? If it were to do so, e.g., to disallow the flag to be displayed under political auspices other than by the Republican and Democratic Parties, would it be valid by force of this proposed amendment, or invalid either under the first amendment or under the fifth amendment (e.g., Socialists, Environmentalists, Communists, Libertarians)? Some, as have already noted, may conclude that insinuating the flag with fast food stores "desecrates" the flag, i.e., lessens its unique symbolism of national unity. Does the amendment authorize Congress and the States to draw such lines? If it does, does it mean also to exempt all such lines as either Congress or any State may thus presume to draw from first amendment review?)

[9] There is a related problem one must resolve in this regard. The problem is that of baseline definition of the phrase "the flag of the United States." Assuming one gets control of what it is to commit an act of "physical desecration," still, consistent with the proposed terms of the amendment, it is not subject to prohibition unless it is physical desecration of "the flag of the United States."

Initially, the term seems clear enough, i.e., one starts with a standard flag of the United States and does something with it or to it that "physically desecrates" that flag. And that understanding dovetails with the background from which this proposed amendment arose, i.e., *Texas v. Johnson*, involving, as it did, the burning of, and spitting on, a flag. But suppose one does not start with an intact flag which one then alters in some way. Rather, one starts at the opposite end. The simplest example would be a swim suit designer who designs a bikini using the stars-and-stripes motif. Raquel Welch has been previously photographed in just this way. There never was a flag that was itself altered, disfigured, torn, or modified. There was no flag physically desecrated in the construction of this suit. Neither did Ms. Welch physically desecrate any flag of the United States.

But if that is so in Ms. Welch's case, what then of any other original construction others may provide, i.e., constructions that never were a flag, whether a flag bought commercially, or a flag made at home? A sculptor, wishing to make a political point, constructs and displays an original work. Suggesting a swollen phallus and a cannon, the barrel is spiraled with alternate red and white stripes. The gun carriage, misshaped to suggest a scrotum, is blue, superimposed with white stars. The message is loud, clear, and confrontational. But what flag was physically desecrated, since the artist never used a flag as such at all.

An American Nazi may take a standard flag, cut out a swastika-shaped piece, and stitch in an identically-shaped piece of black cloth. He has, in *his* acts physically altered (and desecrated?) a flag in the course of producing this item. But a different person may do no such thing. Rather, she starts with simple, separate pieces of red, white, blue, and black cloth. She assembles them to produce a flag identical to the one the American Nazi produced. At no time in the course of her work, however, has she physically desecrated any flag of the United States; there never was a flag of the United States she laid hands on in any way, whether her own or that of someone else. (*Cf* the sculpture and the bikini cases just described.)

The uncertain answer to this last question brings us full circle. It likewise brings these brief preliminary Notes to a swift close. **First**, the amendment is ill thought out. It is quite unclear in what it does and does not empower Congress and the States to do, in presuming to treat particular acts as acts of "physical desecration" of the flag. **Second**, the amendment says nothing concrete to remove such legislation as might be adopted consistent with its provisions from rulings like that in *Texas v. Johnson* itself. Any law adopted within the authorization of this amendment may therefore continue to be invalid as applied, for nothing in the amendment proposes to repeal or otherwise displace anything in the Bill of Rights. Third, and finally, moreover, there is a larger point to consider as well: this proposed amendment does not speak well of the United States. It ought not be accepted or approved.

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PLURIBUS
UNUM

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TO: Chairman of the Judiciary Committee
Representative Don Edwards

Testimony of Rita Warren, President
Christian Civil Liberties Union
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Tel: 703-352-1553

WHAT THE FLAG MEANS TO ME. It began in 1977 when I went to speak at the Brockton High School and I noticed that there were no United States flags in any of the class rooms. I asked a teacher, "Don't you pledge the Allegiance to the Flag here?," and he replied, "Not anymore." I then asked a student to tell me what the flag meant to him and he replied, "It is a piece of rag."

At that point I got very upset and I told the student that I would help pass a law that you all shall salute and respect this beautiful flag everyday. And I did. On June 14, 1977, in the Massachusetts Legislature a law was passed to bring back the Pledge of Allegiance to the American flag in public schools, in spite of Governor Dukakis' veto of this Bill. By override, it became a law and so the red, white and blue was back in the schools.

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I told them what our flag means to me. It was in 1945--I was 15 years old and after going through four years of horrible war the Nazi soldiers took over Italy and for the last five days of their control of Naples we were without food and water, and Nazis guarded every building with big tanks and machine guns. Every time we heard a gun go off we knew that someone got shot. A six year-old boy ran into the street and he paid the price of freedom with his life. I can never forget that little body lying there dead in a pool of blood. When his mother ran after him they shot her, too.

After five days with no water, I started to have a fever and I cannot describe the pain from hunger. Finally, by the Grace of God, our prayers were answered, and the Americans landed in Naples. As I looked out the window the first thing I saw was that beautiful American flag flying on the trucks. The soldiers not only brought us food, but also Freedom. I am here today because of God's Grace and the Freedom that that beautiful flag represents.

When I became an American citizen I pledged to become 100 per cent American, and I will die to defend the Constitution which our Founding Fathers gave us and our flag, which is to be loved and respected, not burned.

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This past week I have been talking to lots of people and a European man told me that in his country not only could they not burn their flag, but they don't make fun of their President.

Many American people are contacting their Representatives to support this Amendment. Freedom has to take responsibility, or it is no longer freedom.

Millions of people here and abroad love our flag. We urge this Committee to pass this Amendment and send it to the House for a full vote. If this Amendment dies in Committee, so will democracy, for we still have a government "of the people, by the people, and for the people." We cannot preach to the world to have democracy when we destroy our own.

Thank you and God Bless You.

Love, Prayer, Peace,

Rita Warren

Rita Warren

STAFF PHOTO BY [illegible]

of So. Shore Christian School, Brockton, rally at State House with Mrs. Rita Warren (left) to keep Pledge of Allegiance in schools.

BOSTON Herald American

Legislators vote for flag pledge

By THOMAS RILEY
Staff Writer

In an unusual display of support, members of the Massachusetts House sang "God Bless America" as they voted overwhelmingly on Flag Day yesterday to require teachers to lead pupils in a daily Pledge of Allegiance.

The House vote of 201-37 overrode the veto of Gov. Dukakis, who said the state Supreme Court in an advisory opinion last month held the bil unconstitutional on grounds it would violate the rights of teachers.

Before the tally was flashed on the huge electronic roll call machine in the House, members stood in the chamber and took House Speaker Thomas W. McGee by surprise by bursting into "God Bless America."

Lawmakers are normally chided for demonstrating on the floor, but yesterday McGee, a former Marine, stood at the rostrum holding the gavel, shaking his head, but flashing a rare grin of approval.

The pledge of allegiance to the flag is recited at the start of each House session.

During debate on the veto, Dukakis was chastised for not signing the measure into law and for sending it to the state Supreme Court for an advisory opinion.

If the Senate overrides the veto by a two-thirds majority vote, the bill will then become law despite the veto. It would continue in force until successfully challenged in the courts. The Senate unanimously approved the bill in an earlier vote several weeks ago.

Rep. Michael C. Creedon (D-Brockton), who filed the bill for Rita Warren of Brockton, t
Dukakis and the Supreme Cou
said the court's ruling that the m
is unconstitutional was "a 5-2 decision."

But Rep. Max Volterra (D-
urged the House to uphold the
and the Court. "To compel
tion of the flag pledge, he said,
law. 'You can't shove patriotis
people's throats.'"

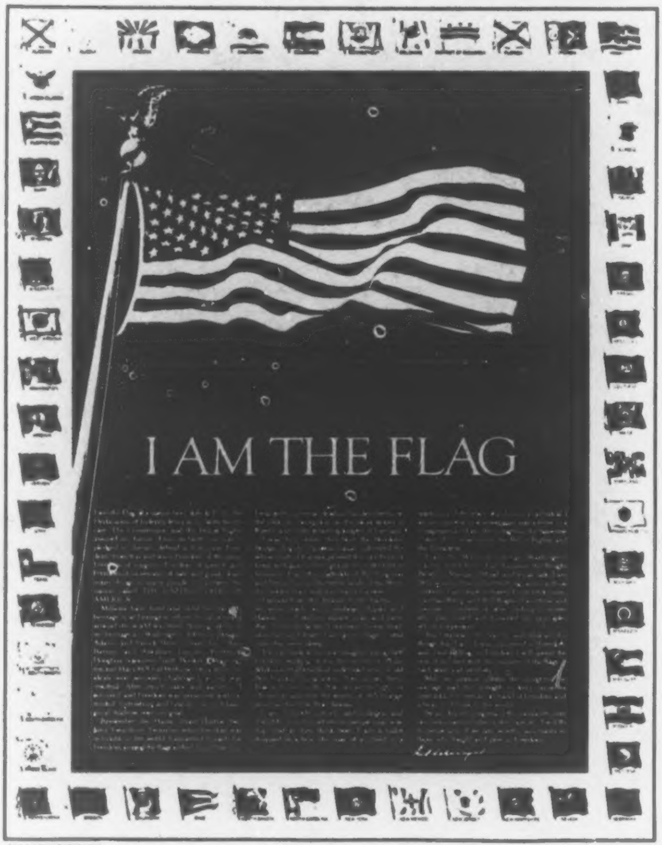
Rep. Mark Lawson (D-Bro
son of Probate Court Judge Ja
Lawson, said as far as he is
the vote issue is "not patriot
politics of patriotism.

"Without the American
loyalty for what it stands," I
"we will have lost our
flounder on a course wit
tion."

IN GOD WE TRUST
AMERICA, Love it or Leave it
but don't Burn it.

Support President Bush's
Amendment to make illegal
the burning of our beloved Flag.
Write to your Congressman.

Thank you and God Bless You
Rita Warren - (703) 352-1553



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